



STATE OF DELAWARE  
**OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER**  
 CARVEL STATE BUILDING, 3RD FLOOR  
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 WILMINGTON, DELAWARE 19801

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Three Patrones Branmar, LLC  
 t/a Kid Shelleen's Charcoal Grill & Saloon  
 1812 Marsh Road  
 Wilmington, DE 19810  
 License No. 15518

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**DECISION AND ORDER**

SUMMARY OF EVIDENCE

1. The above entity ("Applicant") filed an application for a restaurant with Sunday service and sales, a patio license, and variances to permit external speakers, outdoor wet bar and live entertainment on the patio.
2. A valid protest was filed against the application, requiring a public hearing on the application. 4 Del. C. § 541.
3. Protests were received within thirty days from the filing of the application.<sup>1</sup>
4. The Commissioner held a public hearing on the protested application on June 1, 2022 at 5:30 p.m. via Webex, in accordance with Delaware law.
5. Exhibits 1 through 42 were noted for the record.
6. Pamela J. Scott, Esquire, with the law firm of Saul, Ewing, Arnstein & Lehr represented the Applicant.
7. Several persons who signed or submitted a protest against the application appeared at the hearing.<sup>2</sup>

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<sup>1</sup> Untimely protests were also received, but were not considered by this Office.

<sup>2</sup> 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

8. As a preliminary matter, counsel for the Applicant argued that several protests were filed after the thirty day deadline and should not be considered. This Office determined that untimely protests would not be considered. This Office noted, however, and counsel for Applicant agreed, that sufficient protests were received to trigger a hearing.

9. Counsel for the Applicant stated that the Applicant's owners met with the community on March 1, 2022 to address the neighbors' concerns. As a result of that meeting, the Applicant submitted proposed conditions for the patio variances, if granted, that included: 1) external speakers on the patio would play soft, background music at 65 dBA or less measured 100 feet from the property line; 2) acoustical live entertainment would play on the patio up to 16 times a year, ending at 9 p.m., at 65 dBA or less measured 100 feet from the property line; and 3) the outdoor wet bar would close at 10 p.m.

10. One of the Applicant's owners, Mr. Xavier Teixido, testified that he hopes to bring a similar experience to this location as his existing Kid Shelleen's restaurant - outdoor dining has become an essential part of his business, especially given the Covid pandemic. Many guests are still not comfortable with dining indoors. The Applicant testified he intends to offer a respectful ambiance where family and friends can enjoy a great dining experience.

11. Mr. Teixido also testified that four small external speakers would be placed under the awning over the proposed patio facing downward, which is enclosed on one side and surrounded on the other side by a six foot high fence. Music would complement the guests' dining experience.

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evidenced by the person's actual participation as a member of a group, testifying, cross-examining witnesses, and arguing a position. This Office determined the following, who were valid protestors, testified at the hearing and are parties to this matter: Anthony Cappella, Sandy Dobbs, Ted Foschi, Linda Lange, Marianne Robinson, and Janice Smith. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at \*2 (Del. Super. July 1, 1993).

The outdoor wet bar is needed because it would offer more convenience to waitstaff, offer a place for the Applicant's raw bar, and improve the Applicant's quality of service to guests.

12. Several protestors testified about their concerns over loud noise from the proposed patio, external speakers, live entertainment, and outdoor bar. The protestors stated that noise from the Applicant would decrease the value of their residential properties and their quality of life.

13. Counsel for the Applicant acknowledged the following concessions were accurate: 1) ambient music played on external speakers at 65 dBA or less as measured 100 feet from the property line; 2) live entertainment up to 16 times a year, played at 65 dBA or less as measured 100 feet from the property line and concluding at 9 p.m.; and 3) the outdoor bar would close at 10 p.m.

14. Counsel for the Applicant further confirmed that the Applicant also agreed to raise the height of the fence surrounding the patio from four feet to six feet tall.

#### 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. Only protestors who lived or owned or resided on property within a mile of the proposed premise testified at the public hearing.

2. The concerns raised by the protestors focused on anticipated levels of noise that would emanate from the proposed patio because of the external speakers, live entertainment, and customers on the patio.

3. Several protestors also raised concerns about available remedies should noise become a problem.

4. The Applicant proposed several stipulated concessions: 1) ambient music would play on external speakers at 65 dBA or less measured 100 feet from the property line; 2) live entertainment would occur up to 16 times a year, played at 65 dBA or less measured 100 feet from the property line, to conclude at 9 p.m.; and 3) the outdoor wet bar would close at 10 p.m.

5. Counsel for the Applicant added an additional concession by the Applicant to raise the height of the fence surrounding the patio from four feet to six feet high.

6. No evidence was presented against the application for the restaurant.

#### 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”), but she is not empowered to reject an application unless the applicant has failed to comply with statutory requirements or unless the Commissioner has reasonable grounds to believe that a statutory basis for refusal exists. 4 Del. C. § 304(a)(4).<sup>3</sup>

2. A protest is a jurisdictional requirement to cause a hearing to be held in order for evidence to be presented on the record and is not in itself material evidence of opposition.<sup>4</sup> In this case, several protest letters were timely submitted to this Office. A public hearing was held in order for this Office to consider the application and the objections of the protestors placed into evidence in the record at the hearing.

3. The requirements for a restaurant license are set forth generally in 4 Del. C. §§ 511 and 512, while the requirements for a patio permit and variances are set forth in 4 Del. Admin. Code

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<sup>3</sup> *Park Distributing Co. v. Delaware Liquor Comm.*, 54 A.2d 551, 557 (Del. 1947)

<sup>4</sup> *Alfred I. Dupont Sch. Dist., v. Delaware Alcoholic Beverage Control Comm.*, 343 A.2d 600, 603 (Del. Super. 1975).

§ 704. Title 4 provides that an application must be refused for various reasons as stated in Section

543. One such basis is Section 543(b)(11)(b):

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. For the purposes of this subsection, the term “substantial objection” shall include: ... (b) any objection, or group of objections, presented to the Commissioner either individually or as a group, the content of which gives the Commissioner reason to believe the quality of life of the community in which the license is to operate will be adversely affected by the granting of the license.

4. No protestor or other property owner or resident within one mile of the Applicant’s proposed premises presented any evidence into the record during the hearing against the application for the restaurant.<sup>5</sup> Rather, the protestors testified about their concerns about noise from the patio and variances for external speakers, outdoor wet bar and live entertainment, which would decrease the value of their properties and quality of their lives.

5. Counsel for the Applicant stated the Applicant, after meeting with several of the protesters, proposed several concessions to allay the neighbors’ concerns, including: 1) ambient music played on external speakers at 65 dBA or less as measured 100 feet from the property line; 2) live entertainment up to 16 times a year, played at 65 dBA or less as measured 100 feet from the property line and concluding at 9 p.m.; and 3) the outdoor wet bar would close at 10 p.m. Counsel for the Applicant added an additional concession by the Applicant to raise the height of the fence surrounding the patio from four feet tall to six feet tall.

6. Mr. Xavier Teixido requested the live entertainment and external speakers in order to bring ambiance to the patio and contribute to guests having an enjoyable dining experience. He

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<sup>5</sup> *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).

requested the outdoor wet bar as a convenience to the Applicant's servers, as a place for the Applicant's raw bar, and would improve the Applicant's service to guests.

7. Based upon the evidence presented, this Office concludes the application meets the requirements of a restaurant license and a patio permit. This Office also concludes the application meets the requirements for the three requested variances, as the Applicant showed good cause in the record during the hearing: the live entertainment and external speakers will help provide ambiance to the patio and contribute to guests having an enjoyable dining experience, while the outdoor bar would be a convenience to the Applicant's servers, serve as a place for the Applicant's raw bar, and improve the Applicant's service to its guests. Therefore, this Office approves the patio permit and variances for external speakers, live entertainment, and outdoor wet bar subject to and including those concessions.

#### DECISION AND ORDER

IT IS THIS 28 day of June, 2022, the Decision and Order of this Office that the application for restaurant, patio permit and variances for external speakers, live entertainment and outdoor wet bar are approved, subject to and including the following conditions: 1) ambient music played on external speakers at 65 dBA or less measured 100 feet from the property line; 2) live entertainment up to 16 times a year, played at 65 dBA or less measured 100 feet from the property line and concluding at 9 p.m.; and 3) outdoor wet bar closes at 10 p.m.

The issuance of the license is subject to a final inspection by a representative of this Office.

IT IS SO ORDERED.



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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.