



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

Swinging Delicious, LLC
 t/a Taco Reho
 18784 Coastal Highway
 Rehoboth Beach, DE 19971
 License No. 15469

:
:
:
:
:

DECISION AND ORDER
 Protested Application

SUMMARY OF EVIDENCE

1. The above entity (“Applicant”) filed an application for an extension of premises patio permit, for variances for wet bar, external speakers, amplifiers, and live entertainment on the patio, and for entertainment inside the licensed premise.
2. A valid protest was filed against the application, requiring a public hearing on the application. See 4 Del. C. § 541.
3. The Commissioner held a public hearing on the protested application on June 15, 2022 at 5:00 p.m. via Webex, in accordance with Delaware law.
4. Exhibits 1 through 13 were noted for the record.
5. Stephen W. Spence, Esquire, with the law firm of Baird, Mandalas & Brockstedt, represented the Applicant.
6. Several persons who signed or submitted a protest against the application pre-registered to testify or appeared at the hearing.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. This Office determined the following, who were valid protestors,

7. As a preliminary matter, this Office noted that one protestor submitted photographs and what appeared to be an unviewable video after the submission deadline. Counsel for the Applicant submitted a letter objecting to the untimely documents. This Office determined the photographs and unviewable video and counsel's letter objecting to them were filed with this Office after the deadline for submissions, and thus would not be considered or included as part of the record.

8. The Applicant's owner, Mr. William Lucas, testified that he wants to play lightly amplified acoustic live music on the patio, up to four times a year, until 9 p.m. Four external speakers would play ambient music that would also end by 9 p.m.; the speakers would not be in operation when live music is played. The wet bar has five barstools which serve as a convenience to its customers. The extended patio would have eight tables, 36 dining chairs and the five barstools. These features would provide an enjoyable atmosphere, and the music would add ambience for customers and minimize traffic noise from adjacent Route 1. The Applicant's contractor recommended four speakers for sound quality.

9. Mr. Lucas testified that he tested the speakers by playing music at the intended volume and walking to the back of the premises, where he could not hear the music. Loud music is contrary to the Applicant's business plan.

10. Mr. Lucas testified that he measured sound on the patio without music as 75 to 95 dBA. He turned on music over the external speakers, and the sound measured the same at 75 to 95 dBA. At the back of the Applicant's building, sound measured 58 dBA to 65 dBA with music playing over the external speakers.

testified at the hearing and are parties to this matter: Mary Ellen Hassett, Michael Hayes and Angel Kerrigan. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993).

11. Mr. Lucas testified that the external speakers are installed 65 inches high, with two speakers facing north and two speakers facing west; all four speakers are angled downward to the patio. Mr. Lucas testified the external speakers would be turned off when live entertainment is playing. Mr. Lucas further testified that live music would be one or two acoustic musicians played over the musician's amplifier which would be positioned to face the Applicant's building. Mr. Lucas explained the building has additional sound-dampening features.

12. Several protestors testified about their concerns for loud noise from the proposed external speakers and live entertainment with an amplifier on the patio. The protestors testified that noise from the Applicant would decrease the value of their residential properties in the neighborhood of Maplewood, located behind the Applicant's business, and negatively impact their quality of life. The protestors testified the Applicant should install a fence and sound barrier to remedy its noise. The protestors testified they were worried they would not be able to enjoy their properties if the patio variances were granted, stating the Applicant has a successful business without the variances and questioned the need for them.

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 Applicant's premise testified at the public hearing.²

² 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. This Office determined the following, who were valid protestors, testified at the hearing and are parties to this matter: Mary Ellen Hassett, Michael Hayes and Angel Kerrigan. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993).

2. No evidence was presented against the application for live entertainment inside the premises, against the extension of the patio, or the wet bar.

3. The concerns raised by the protestors focused on noise that could emanate from the proposed patio because of the external speakers or the live entertainment and amplifier.

4. Several protestors also raised concerns about remedies available to neighbors if noise becomes a problem.

5. While music was playing over the external speakers at the intended volume, Mr. Lucas measured noise at the back of the premise to be 58 to 65 dBA.

6. No evidence was presented to refute or rebut this measurement or to show that noise exceeded 65 dBA.

7. The Applicant will have live entertainment on the patio up to four times a year, ending at 9 p.m.; light ambient music would be played over the external speakers and turned off by 9 p.m.; and no music would be played on the patio after 9 p.m.

CONCLUSIONS OF LAW

1. This Office makes the following legal conclusions pursuant to 29 Del. C. § 10128(b)(3): 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. See 4 Del. C. § 304(a)(4).³

2. A protest is a jurisdictional requirement that triggers a hearing in order for evidence to be presented on the record and is not in itself material evidence of opposition.⁴ In this case, protest

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

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

letters with signatures were submitted to this Office. A public hearing was held 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 an expansion of the existing patio and variances, as requested here, are set forth in 4 Del. Admin. Code § 704. The Act authorizes refusal of an application, including for expansion of premises and variances on a patio, under certain circumstances, including:

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.

See 4 Del. C. §543(b)(11).

4. In the present matter, it is undisputed that some of the testimony from the protestors concerned installation of a fence or sound barrier. This Office’s powers, which are set forth in Section 304 of Title 4 of the Delaware Code, do not encompass the authority to consider or determine requests for fencing or sound barriers.

5. Based upon the evidence presented, this Office concludes the application meets the requirements for an extension of its existing patio, live entertainment indoors and wet bar. No evidence was presented in the record of any objections to these applications. Thus, this Office does not have any evidence on which to consider a denial of the applications for entertainment indoors, extension of the patio or wet bar.

6. In addition, this Office also concludes the application meets the requirements for the requested variances on the patio, to include a wet bar, external speakers, and live entertainment with amplifier use as the Applicant showed good cause in the record during the hearing. The

Applicant testified the wet bar would serve as a convenience, while the external speakers, amplifier and live entertainment would create ambiance and an enjoyable environment for its customers and drown out some of the traffic noise from Route 1. The Applicant presented unrefuted evidence of measuring the sound from the external speakers at the back of the licensee's premises, as 58 to 65 dBA.⁵ Based upon the evidence presented, this Office also approves the application for variances to allow external speakers and live entertainment with amplifier on the patio as set forth in this Decision.

DECISION AND ORDER

IT IS THIS 28 day of June, 2022, the Decision and Order of this Office that the application for an extension of premises patio permit, and variances to the patio to permit a wet bar, external speakers, and live entertainment with amplifier use on the patio, and entertainment inside the premise is approved. The patio variance approvals are subject to the following conditions: (1) the four external speakers on the patio will be turned off by 9 p.m.; (2) live entertainment on the patio will be limited to up to four times a year, consist of acoustic music, and stop by 9 p.m.; and (3) all music outdoors on the patio shall stop by 9 p.m.

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

IT IS SO ORDERED.



The Honorable Jacqueline Paradee Mette, Esq.
Commissioner

⁵ This level of sound appears to be consistent with permissible levels set forth in the Delaware Liquor Control Act. See 4 Del. C. §561(g) (a license may be suspended where operative average sound level equal to or greater than 65 dBA, but less than 75 dBA; license shall be suspended where operative average sound level is equal to or greater than 75 dBA).

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.