



STATE OF DELAWARE  
**OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER**

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MFC Fenwick, LLC  
t/a Matt's Fish Camp  
700 Coastal Highway  
Fenwick Island, DE 19944  
License No. 15429

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**DECISION AND ORDER**  
Protested Application

**SUMMARY OF EVIDENCE**

1. The above entity ("Applicant") filed an application to alter its existing liquor license, stating in its request that it wished to update its interior floorplan slightly, and add patio seating.
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 August 2, 2022 at 5 p.m. via Webex, in accordance with Delaware law.
4. Exhibits 1 through 33 were noted for the record.
5. Vincent Robertson, Esquire, with the law firm of Parkowski, Guerke & Swayze, P.A., represented the Applicant.
6. Several persons who signed or submitted a protest against the application pre-registered to testify or appeared at the hearing.<sup>1</sup>

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<sup>1</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(6). 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: Mr. John Pyne; Herschel Quillen; Gail Warburton; and Janice Bortner. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at \*2 (Del. Super. July 1, 1993).

7. As a preliminary matter, Applicant's counsel objected that one person who registered to testify at the hearing was not a valid protestor because he did not reside within one mile of the Applicant's premise. This Office stated that Section 541(b) of Title 4 provides that a protestor, for purposes of triggering a public hearing, can be a resident or property owner within one mile of a proposed premise/licensee, and that the appropriate weight would be accorded to any evidence or testimony from all protestors pursuant to Section 543(d). Applicant's counsel also stated that the protestors objected to Applicant's proposed outdoor seating but did not oppose its proposed interior alterations.

8. Applicant's owner, Matthew Patton, testified the second-floor patio is enclosed by three sides and would have approximately 12 tables and 45 dining seats. The second-floor interior features a bar with 22 barstools, dining booths and banquettes, and several high-top tables. Applicant's owner confirmed no variances were requested or exist on the second floor patio.

9. Applicant's owner testified the premises faces Delaware Route 1, also known as Coastal Highway, which has heavy traffic. Applicant also testified that other restaurants in the Town of Fenwick Island have outdoor dining.

10. Applicant's owner also testified that no drinking would be permitted on the proposed outdoor first floor patio until customers are seated.

11. Several protestors testified about their concerns with customers' loud noise and boisterous behaviors, including that customers had been observed in the outdoor space proposed for outdoor dining holding drinks while waiting to be seated, and objected to customers waiting outside with alcoholic beverages. Several protestors testified that the Town of Fenwick Island is a quiet community that is primarily residential, and that consumption of alcoholic beverages outside the

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premises created not only a noise concern, but also a safety issue, given the proximity of Delaware Route 1 to the licensed premises.

12. Mr. Patton testified the Applicant has endeavored to keep noise at the premises to a reasonable level.

13. Applicant's counsel acknowledged that the Applicant's request to increase bar seating as part of the proposed interior alterations had not been noticed to the public. The Office had already approved 115 dining seats and 27 bar seats for the interior of the premises.

#### 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 owned or resided on property within a mile of the Applicant's premise testified at the public hearing.
2. Applicant's notice to the public for its application for alteration did not include the request to increase the bar seating inside the restaurant.
3. No evidence was presented against the application for increased indoor dining seating.
4. Most, if not all, of the concerns raised by the protestors focused on noise that could emanate from the outdoor areas, customers consuming alcoholic beverages outdoors close to the sidewalk, and public safety concerns.

#### 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. See 4 Del. C. § 304(a)(4).<sup>2</sup>

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.<sup>3</sup> In this case, protest 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 adding seating on an outdoor patio and interior alterations to expand seating indoors, as requested here, are set forth in 4 Del. C. Ch. 5, and 4 Del. Admin. Code §§ 703, 704. The Act authorizes refusal of an application, including for increased seating 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 none of the evidence from the protestors showed any objection to the Applicant’s request to alter its interior floor plan for seated dining. This Office concludes the application meets the requirements for an increase of its existing indoor table seating for dining. Without evidence presented in the record of any objections to the request for increased

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

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

indoor table seating, this Office does not have any substantiation on which to consider a denial of this portion of the application.

5. This Office also concludes the application meets the requirements for the requested alteration of the patio to allow three tables of six dining seats at each table outdoors on the first floor. Again, this Office does not have adequate substantiation of objection in the record to this request.

6. Last, this Office concludes the application did not meet statutory requirements for the Applicant's request to increase the interior bar seating. The Applicant's notice to the public did not state the nature of this application sought. In addition, the rules of this Office require a ratio of four dining seats to one bar stool, excluding any seating on a patio, for a restaurant liquor license.

#### DECISION AND ORDER

IT IS THIS 18 day of August, 2022, the Decision and Order of this Office that the application for an alteration of the premises, specifically the adding of three tables and 6 dining seats at each table on the existing patio is approved; the application to add bar stools to the existing indoor bars is denied. 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.