



STATE OF DELAWARE
OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER

CARVEL STATE BUILDING, 3RD FLOOR
820 NORTH FRENCH STREET
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Bethany Diner, Inc.
t/a Bethany Diner
792 Garfield Parkway
Bethany Beach, DE 19930
License No.

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DECISION AND ORDER
Protested Application

SUMMARY OF EVIDENCE

1. The above entity (“Applicant”) filed an application for a restaurant liquor license (beer and wine only). No outdoor patio permit, and thus no variances for a patio, were requested.
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 November 1, 2022 at 5 p.m. via Webex, in accordance with Delaware law.
4. Exhibits 1 through 43 and Exhibit 45 were noted for the record. There was no exhibit marked “44.”
5. Vincent Robertson, Esquire, with the law firm of Parkowski, Guerke & Swayze, P.A., represented the Applicant. Mr. Elihan Hajiyev also appeared on the Applicant’s behalf as one of its owners.
6. Several persons who signed or submitted a protest against the application pre-registered to testify and 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(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:

7. Applicant's counsel argued the Applicant's parcel is zoned by the Town of Bethany Beach as C-2. C-2 is a commercial zoning that allows retail businesses, including restaurants, and restaurants with a liquor license. Applicant's counsel argued that because of this zoning, the town had already determined the Applicant's business and premises are appropriate for a liquor license. Applicant's counsel also argued there are other restaurants in a two-block area by the Applicant that have full restaurant liquor licenses and large bars, and so the town decided the sale and service of alcoholic beverages in those two blocks was acceptable also.

8. Mr. Elihan Hajiyevev testified that some of Applicant's customers have requested alcoholic beverages with their meals. Mr. Hajiyevev testified he intends to purchase 3 to 4 bottles each of beer and wine to serve to his customers. Mr. Hajiyevev testified he is surrounded by larger restaurants with full liquor licenses, and his diner would remain family-oriented because of its hours of operation, layout of the diner and 90% of its regular customers are families and children. Mr. Hajiyevev testified there would be no live entertainment, music or dancing. The diner has a small service counter and refrigerator currently used to store ice cream; if approved, this area would instead be used to store and cool beer and wine. Mr. Hajiyevev testified he would stop service of alcoholic beverages by 9 p.m.

9. Several protestors testified against the application, citing vehicular traffic concerns near the applicant's place of business, overflow parking concerns, and concerns regarding pedestrians trespassing on their properties. The protestors described these concerns, and stated they believe a liquor license issued to the Applicant would cause disruption and adversely impact the quality of life of their community. One protestor testified that a liquor license would certainly attract more

Ms. Sheila Boland, Ms. Jean Janssens, and Mr. Randy Hall (in support of the application). *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993).

customers, many of whom already walk through their neighborhood and cross their lawns to get to their cars. The protester testified she believed Applicant would change its current business practices to accommodate customers' preferences.

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. Protestors who lived or owned or resided on property within a mile of the Applicant's premise testified at the public hearing.

2. Most, if not all, of the concerns raised by the protestors focused on vehicular traffic, parking and pedestrian traffic which cause congestion and accidents, and trespassing on private property in the nearby neighborhood, which they believed would increase with a liquor license.

3. The Applicant's owner testified that, if approved for a liquor license, the service of beer and wine would stop by 9 p.m. daily and there would be no live entertainment indoors or outside.

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).²

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.³ In this case, protest

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).

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 a beer and wine only restaurant license, as requested here, are set forth in 4 Del. C. Ch. 5, and Title 4 of the Delaware Administrative Code. The Act authorizes refusal of an application, including for a beer and wine only restaurant, under certain circumstances, including:

(11) 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 within which the license is to operate will be adversely affected by the granting of the license.

See 4 Del. C. § 543(b)(11).

4. The Applicant’s owner testified he would not have indoor entertainment. The Applicant’s floor plan supports this testimony, as it shows no stage or area for entertainment or dancing. The Applicant also did not apply for a permit for an outdoor patio or outdoor entertainment.

5. Applicant’s owner also testified he would have three to four bottles each of beer and wine, stop serving alcoholic beverages by 9 p.m. and not change his business plan as a family-oriented diner, as 90% of his regular customers are families and children.

6. In the present matter, this Office concludes the application meets the requirements for a beer and wine only restaurant liquor license. The protestors objected to approving the application, citing vehicular traffic that causes congestion and accidents, patron parking in the neighborhood, and pedestrian traffic trespassing on their properties; they also testified another liquor license in this area will likely worsen these incidents, and their quality of life will be adversely affected.

These incidents are already happening, and there was no testimony that proved it would increase as a result of approving this license.

7. The Office appreciates the protestors' testimony, but the testimony did not establish a nexus between their concerns and the Applicant's business, nor did it establish that granting this license will cause those concerns to increase. The diner is located in a commercial area with five establishments that possess a liquor license. Even though there was testimony about the adverse impact an additional liquor license in this area might have on the quality of life of the nearby neighborhoods, this Office does not have sufficient evidence upon which to deny the application. See Section 543(b)(11)(b).

8. The Delaware General Assembly has authority over the manufacture, distribution, sale, and transportation of alcoholic liquors as an exercise of the state's police powers.⁴ The purpose of Delaware's liquor laws is to make alcoholic liquors available, but under rigid control at all times in the interest of the general welfare.⁵ The Delaware General Assembly established the Delaware Liquor Control Act ("Act") and delegated the State's police powers of liquor regulation to this Office. It is the State of Delaware that has "peculiar and exclusive control over alcoholic liquors."⁶

9. A liquor license in Delaware is a temporary permit issued under the authority of the State in the exercise of its police powers to do that which otherwise would be unlawful.⁷ A Delaware liquor license is notably different from local zoning decisions governing real property. Zoning decisions are categories of permitted land use decisions within a comprehensive plan. Delaware

⁴ *Lyons v. Delaware Liquor Comm.*, 58 A.2d 889, 894 (Ct. Gen. Sess. 1948). The Twenty-first Amendment of the U.S. Constitution affords the states broad powers to regulate the times, places and circumstances under which liquor may be sold within their borders. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 715 (1981).

⁵ *Wilmington Country Club v. Delaware Liquor Comm.*, 91 A.2d 250, 254 (Del. Super. 1952).

⁶ *State Highway Dept. v. 0.622 Acres of Land, et al.*, 254 A.2d 57, 58 (Del. Super. 1969).

⁷ *Down Under Ltd. V. Delaware Alcoholic Beverage Control Comm.*, 576 A.2d 675, 679 (Del. Super. 1989)(citation omitted).

courts recognize the distinctive characteristics between this Office's enabling authority regarding liquor licenses and a local authority's ability to regulate land use within its borders.⁸ A town's zoning determination of a land parcel as appropriate for a restaurant, which may include the service and sale of alcoholic liquors, is a consideration whether to grant or deny a liquor license,⁹ but defaulting to a town's zoning approval as the basis for granting a liquor license would render an important part of the Act largely meaningless.

DECISION AND ORDER

IT IS THIS 18 day of November, 2022, the Decision and Order of this Office that the application for a beer and wine only restaurant license is approved; approval is subject to the Applicant stopping the sale and service of alcoholic beverages by 9 p.m. daily and not having any entertainment indoors. 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

⁸ See *Hooper v. Delaware Alcoholic Beverage Control Comm.*, 409 A.2d 1046 (Del. 1979)

⁹ See *Kejand, Inc. v. Town of Dewey Beach*, 1996 WL 361518, at *2 (Del. Ch. June 25, 1996).

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.