



STATE OF DELAWARE
OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER

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Hoffman Brewing Company, LLC :
t/a Dew Point Brewing Company :
2878 Creek Road : **DECISION AND ORDER**
Yorklyn, DE 19736 : **Petition Against Licensee**
License No. 14812 :

SUMMARY OF EVIDENCE

Background

1. Hoffman Brewing Company, LLC (“Licensee”) holds a microbrewery license issued by this Office, to include Sunday sales; a patio permit; and two variances to the patio permit that allow a wet bar and live entertainment.
2. A valid petition was filed against the Licensee for complaints regarding the conduct of its business pursuant to 4 Del. C. § 304(a)(5).
3. The Commissioner held a public hearing on August 23, 2022, starting at 4 p.m., via Webex in accordance with Delaware law. The hearing was held to consider the complaints about the Licensee’s conduct of its business operations; the hearing lasted 5.5 hours.
4. Adam Balick, Esquire, with the law firm of Balick & Balick, LLC, represented the Licensee.
5. Numerous petitioners and concerned citizens against the Licensee, and supporters in favor of the Licensee, participated in the hearing on August 23, 2022.¹ The Petitioners were not

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

represented by counsel. Two Petitioners, Jennifer Wasson and Chad Stover, are attorneys with the Delaware Bar and appeared in their personal capacity as neighborhood residents.

6. The notice of the hearing was sent to the Licensee and Petitioners and this Office caused the notice to be published in two newspapers and posted to the state's meeting calendar website, pursuant to Delaware law. The Licensee and Petitioners were required to submit exhibits to this Office by August 12, 2022. In addition, those who wished to testify during the hearing were required to pre-register by noon on August 22, 2022.

7. The Licensee submitted 100 exhibits, which this Office designated as "DPB Exhibit" followed by a corresponding number for each exhibit. The Petitioners submitted seventeen exhibits and twenty-nine video exhibits which this Office designated as "P Exhibit" and "PV Exhibit" respectively, followed by a corresponding number for each exhibit.²

8. This Office received objections to the Licensee's proposed exhibits, and requested the parties confer before the hearing to attempt to resolve objections. Petitioners, through Ms. Wasson and Mr. Stover, and Licensee's counsel conferred, and then communicated to this Office their respective positions related to Petitioner's concerns about Licensee's exhibits, which largely related to photos and video exhibits of music events held on Licensee's premises. After reviewing this information, the Office determined to enter all the exhibits into the record, and notified the parties.

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). The Commissioner finds the following are "parties" to this matter: Mr. Carlos Alejandro, Mr. Jay Bancroft, Dr. Jacalyn Beam, Dr. Steven Beam, Ms. Wendy Eshleman, Mr. John Hoffman, Dr. Felicia Hurewitz, Ms. Diana Le Sieur, Mr. Chad Stover, Ms. Jennifer Wasson, and Mr. Brian Woodcock.

² This Office designated notices of the hearing, proof of newspaper ads, returned letters, pre-hearing requirements and the like as "OABCC Exhibits" followed by numbers 1 through 16 accordingly.

9. This Office read all exhibits for the record: P Exhibits 1 through 17, PV Exhibits 1 through 29, DPB Exhibits 1 through 100, and OABCC Exhibits 1 through 16. Neither side made an objection to the exhibits read into the Record.

10. As a preliminary matter, a Petitioner requested this Office confirm its receipt of one document sent by email that this Office did not read, because it appeared to have “bounced back” to this Petitioner; counsel for Licensee stated he received the exhibit in question. This Office tabled the matter if and until this exhibit became an issue during the hearing. Neither side objected.

Positions of the Parties

11. Petitioners did not object to the existing microbrewery license, patio permit, live entertainment inside the premises, or location of the microbrewery.

12. Petitioners’ objections went to the frequency and loudness of outdoor music at Licensee’s premises.³ Specifically, Petitioners requested that this Office:

- a. Confirm that amplifiers and speakers on the outside patio are not part of Licensee’s variance;
- b. Confirm that Licensee is not allowed more than two outdoor concert events per month between April 1 and September 30; and
- c. Require Licensee to remove its fence that encloses part of the Yorklyn Bridge Trail within the space Licensee uses for its outdoor concerts and events.

13. The Licensee disagreed with Petitioners’ claims, contending that the noise complaints did not exceed State law based upon Licensee’s measurements, Licensee lowered the volume of music when residents complained, Licensee did not previously commit to a limited number of outdoor

³ The Petition also included complaints about parking and traffic related to the Licensee. However, these concerns were not raised during the hearing or in the exhibits. In addition, this Office believes those matters are best addressed with county or local governments and representatives who have authority over parking and traffic issues, which this Office does not possess. Therefore, this Office will not consider complaints about parking and traffic for this Decision.

live entertainment events, and with the pandemic, the Licensee offered local musicians a place to perform.

Summary of Testimony

14. Protester Ms. Diana Le Sieur, who testified she resides approximately 700 feet from Licensee's premises with her mother Ms. Winnie Arnold, testified the Licensee's loud noise and frequent live entertainment prevent her and her elderly mother from hearing their television, opening windows in their home, and sitting outdoors. Ms. Le Sieur testified that at the OABCC protest hearing in 2018, Mr. Hoffman stated the Licensee would have only one to four concerts a year for specific occasions, such as Yorklyn Days. Ms. Le Sieur testified that in 2021, Licensee held concerts every Friday, Saturday and Sunday weather permitting. Ms. Le Sieur testified that patrons from Dew Point trespass on her property after the Licensee closes, causing her to take security measures to prevent patrons from doing so. She testified she has received threats because of her complaints. Ms. Le Sieur's mother's video statement related to the noise complaints was admitted as P Exhibit 4.

15. Mr. Carlos Alejandro, who owns two adjacent properties near Licensee, testified his elderly neighbor is a long-term Yorklyn resident and can no longer sit on her porch because of Licensee's loud noise from live events. Mr. Alejandro testified he believed Licensee had over 100 live events in 2021; he assumed 50 of those were outside. Mr. Alejandro testified that Yorklyn is predominantly residential, with many longtime residents there before the microbrewery.

16. Mr. Chad Stover testified regarding noise issues and the evidence admitted into the record relating to noise level measurements. Mr. Stover testified there was no evidence that Licensee

calibrated its decibel reading device before it measured noise during its live events.⁴ Mr. Stover testified that he measured noise readings in his backyard during Licensee's outdoor live entertainment. Mr. Stover testified the sound from Licensee's live entertainment measured in his backyard was at least 60 decibels. Using an online calculator from Georgia State University, he testified that a sound of 65 decibels at 100 feet from Licensee, which is permissible, should be 38.2 decibels in his backyard, or equal to the sound level of a quiet library. Because sound level in his backyard during Licensee's concerts was much higher than a quiet library at 38.2 decibels, Mr. Stover testified he knew with certainty the sound levels of Licensee's noise at 100 feet are far higher than 65 decibels. He testified that he also inputted 75 decibels into this calculator, which should result in 48.2 decibels of noise in his backyard, or the sound level of a quiet conversation. Because the sound level in his backyard during Licensee's concerts was measured to be higher than 48.2 decibels, he concluded the noise at 100 feet from the Licensee's property was at least 75 decibels.

17. Dr. Felicia Hurewitz testified for petitioners on the negative psychological and cognitive effects caused by amplified music in a quiet neighborhood. Dr. Hurewitz testified that noise interferes with cognitive functioning, including attention, concentration, memory, reading ability, and sound discrimination. She testified many people suffer sound discrimination, especially those with sensitivities or hearing impairments. Dr. Hurewitz testified that she perceives a decrease in access to Auburn Valley State Park for those with such disabilities and hearing impairments because of Licensee's loud outdoor events. She testified that loud background noise would overwhelm a hearing aid user and lead to painful input.

⁴ Mr. Stover testified the online instruction manual for Licensee's decibel reading device, a REED Instruments R8050, states, "calibrate the instrument before operation" and "calibration is vital in ensuring that your sound level meter is in proper working condition when measuring noise."

18. Dr. Jacalyn Beam and Dr. Steven Beam also testified in support of the protest. Dr. Jacalyn Beam testified that their home is approximately ½ mile away from the Licensee's premises and she is unable to enjoy her patio because of Licensee's loud outdoor events. DPB Exhibit 88, a measurement on a Google map of Dr. Beam's house from Licensee's establishment, also indicates it is a distance of .5 miles. Dr. Jacalyn Beam testified that Licensee has exceeded noise standards in 2021 measured by a CDC algorithm, decreased the quality of life for her and neighbors, and its outdoor live events denied the public access to a State hiking trail. Dr. Jacalyn Beam testified that if Licensee were abiding by a less than 65 decibel level at 100 feet, she should not be able to hear words to songs or specific instruments, and yet she hears words to songs and specific instruments. She also testified that Licensee's noise prevents her from enjoying her patio, outdoor activities in the Yorklyn area, and her small business in *en plein air* painting. She testified she can no longer document Yorklyn buildings *en plein air* because of Licensee's noise from its amplifiers and speakers. Dr. Steven Beam testified he can hear the music from Licensee's events inside his home as well as outside on their property. He finds the loud noise extremely bothersome and negatively impacts the quality of his life. Dr. Steven Beam testified he is a biologist and landscaper, but the loud noise from Dew Point forced him inside many weekends.

19. Mr. John Hoffman, owner of the Licensee, testified the brewery opens its outside beer garden on weekends, but not always during the week.⁵ He testified there has usually been music on Saturdays, and the Licensee would open its outdoor bar during music events. Mr. Hoffman testified about the stage Licensee constructed for bands to play music, as depicted in video exhibits the Licensee submitted. In reviewing DPB Exhibit 5, which depicted a band playing on Licensee's outdoor stage with musical instruments, plugged into what appear to be amplifiers and speakers,

⁵ The Licensee does not hold a beer garden liquor license.

Mr. Hoffman testified the Licensee aims for noise levels of 90 to 95 decibels at the stage. DPB Exhibit 5 also showed the location of children in relation to the stage; the children were a few feet to 1-2 yards from the stage. The Licensee testified that the goal is for noise measurements at the location of the children to be between 80 and 85 decibels.

20. Mr. Hoffman testified he or his employee took decibel measurements of bands playing on the outside patio, using a new REED R8050 decibel reader, which has a margin of error of plus or minus 1.4 decibels. Mr. Hoffman acknowledged the Licensee took other sound readings from 2022 that were not submitted as exhibits, did not take readings longer than 10 seconds at one time, and did not record readings for the entire song of a band. Mr. Hoffman testified the Licensee's measured sound readings were all below 65 decibels located at 100 feet off the property.

21. Mr. Hoffman testified that the Licensee lectures bands about noise, Licensee sets up the sound system, and Licensee checks that the band is within permitted decibel levels. Mr. Hoffman testified the Licensee has its own sound system controlled through a phone or iPad. Mr. Hoffman testified he or a sound person he has hired walk through the outdoor area, measure noise, and adjust the sound system if needed. He also testified that he or a sound person will walk the edges of the property or slightly off the property to measure noise. Mr. Hoffman testified they use the decibel meter to measure noise levels two to three times a day, at multiple positions. He testified they aim for 55 decibels at approximately 50 or 75 feet up the hill from the brewery property because this level of decibels provides a buffer. They videotaped some of their measurements because of complaints about noise.

22. Mr. Hoffman testified DPB Exhibit 37 showed the Licensee's decibel meter at the Creek Road entrance down the hill from Dr. Beam's property, which is .5 mile away from the Licensee's premises; during the soundless video, the meter reading in the video ranged from 56 – 61.6

decibels. Mr. Hoffman testified DBP Exhibit 38 is a video of the decibel meter located on the other side of the stone wall from his premise; during the soundless video, the highest level of the meter reading was 54.2 decibels. Mr. Hoffman testified he takes a still photo of videos to establish a date and time stamp. DPB Exhibit 38 was taken June 25, 2022 at approximately 3:49 p.m., the same day Dr. Jacalyn Beam complained about the Licensee's volume to Lt. James Diana, an officer with the Delaware Department of Safety and Homeland Security's Division of Alcohol and Tobacco Enforcement ("Division").

23. Mr. Hoffman testified the Licensee has not received violations for noise from the Division or Delaware State Police Troop 1. Mr. Hoffman testified he has received calls from neighbors complaining of the noise levels. He has lowered the volume, but testified that some of the noise complaints appeared to relate to a different source or event.

24. Mr. Hoffman testified that during the 2018 protest hearing, he testified that the Licensee would do a limited number of events from 3 or 4 p.m. to 9 p.m., and the rest would end by 6 p.m. He acknowledged that his 2018 testimony was he would have 15 to 25 events, but did not know the precise number the Licensee would schedule. Mr. Hoffman testified the Licensee had approximately 21 or 22 events in 2019, between 55 and 60 events in 2020, and between 65 and 75 in 2021. As of August 2022, the Licensee had approximately 18 events and had four more events planned for 2022. He testified the significant spike of events in 2020 and 2021 was because of Covid, which caused the Licensee to move its operations outside.

25. Mr. Hoffman testified that for 2022, the Licensee scheduled outdoor live music events only on Saturdays and Sundays. On Saturdays, the events ran from 2 to 6 p.m. and on Sundays from 2 to 5 p.m. If the Licensee had a ticketed event with multiple bands, such as four to six bands, the live music might last until 9 p.m. He testified that a July 4, 2022 live jazz event ended at 7:30 p.m.

26. In addition, Mr. Hoffman testified the microbrewery has become a gathering place for the community. He testified that besides the Arnold's and the Lott's who are protestors, he went into the neighborhood to talk with residents, many of whom said they do not hear noise or barely hear noise from the Licensee, and if they do hear noise, it is not an issue to them. Mr. Hoffman testified he reached out to its customers, and obtained approximately 3,300 to 4,000 signatures in support of the business and its outdoor events (DPB Exhibit 97).

27. Mr. Hoffman testified the Licensee has leagues in horseshoe, ping-pong, and disc golf putting.⁶

28. Mr. Hoffman testified the Licensee leases the property from its owner, Mr. John Lickle. Mr. Lickle gave the State of Delaware a nonexclusive easement that allows the Yorklyn Bridge Trail to pass through the leased site.

29. State Representative Mike Smith testified he received numerous emails and phone calls from his constituents, ranging from their 20's to 70's, in support of the Licensee. Rep. Smith testified Yorklyn and its residents are not within his representative district and he does not reside in Yorklyn.

30. Matthew Chesser, Esq., testified he was the person who created the concept that became the Auburn Valley Master Plan. He testified based on his historical knowledge and previous involvement with area projects, stating the Master Plan called for a mixed use of the area, including restaurants, shops, houses, coffee shops, boutique hotels, and offices. Mr. Chesser testified the Yorklyn Village concept was intended to be a work-live-play area with use for community events and festivals. Music is part of the Master Plan for the site, and the State amended the Plan in 2016 to add an amphitheater to the NVF side of the plan. Mr. Chesser testified he negotiated the

⁶ He testified the Licensee does not have cornhole sets outside.

easement for the trail and the concept for the Snuff Mill buildings was to implement modern, not industrial, uses.

31. Mr. Logan Umbrell testified he resides on Lower Snuff Mill Road, approximately 100 yards from the Licensee. He works as an audio analyst. He testified he can slightly hear the Licensee's music events in his front yard, and less in his backyard, but not inside his home. Mr. Umbrell testified there are physical barriers between his home and the Licensee's outdoor stage that obstruct the sound waves.

32. Mr. Brian Woodcock testified he resides on Creek Road approximately 150 feet directly across from the Licensee. He testified his bedroom directly overlooks the Licensee's outdoor stage and the noise does not bother him. Mr. Woodcock testified he can hear the Licensee's music from his yard and sometimes inside his home.

33. Mr. Jay Bancroft and Ms. Wendy Eshleman also testified in support of the Licensee. Mr. Bancroft testified he patronizes the Licensee and is a member of City of Newark Council. He testified the community at large supports what the Licensee has been doing in general for the community. Ms. Eshleman testified she patronizes the Licensee, resides in the first house on Lower Snuff Mill Road, sometimes hears noise from Dew Point but never to the point of being a problem, and stated Licensee is an asset to Yorklyn.

34. Mr. Balick stated there are speakers on the patio and acknowledged a Conforming Order entered May 2022 lists a variance for live entertainment and a wet bar only on the patio.

35. The Commissioner reserved decision on the petition because of voluminous exhibits and lengthy testimony.

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. Petitioners' video exhibits were authenticated by Petitioners during the hearing as videos taken at locations on their property near the Licensee's premises, and Licensee did not object to their introduction into the record. During the 39 second video recording from the patio of protester Mrs. Leota Arnold⁷, located approximately 800 feet away from the licensee's premises, the lyrics of the song are clearly discernible. In PV Exhibit 5, dated October 3, 2020 at 6:14 p.m., one can clearly hear the lyrics of a Grateful Dead song, Aiko Aiko. Additionally, in Petitioners' PV Exhibit 10 from May 1, 2021, the lyrics to the song, "Let It Rain" can clearly be discerned. In Petitioners' PV Exhibit 13, taken on May 13, 2021 at 8:36 p.m., the lyrics from the Kenny Loggins' song "I'm Alright" are clearly discernable. In total, Petitioners introduced 29 video exhibits recording the music from Licensee's premises from August 2020 through July 2022.

2. The Licensee introduced a number of still photographs and video showing a decibel reading device, a Reed R8050, measuring sound at or near the Licensee's premises. In some of the videos, there is no sound, but in others there is sound heard as the device is recording the decibel levels. DPB Exhibit 23 showed decibel readings for music that played on May 28, 2022, and from the eight second soundless video, the decibel device showed the decibel readings rise above 65 decibels during two intervals. On this same date, in Petitioners' PV Exhibits 20 and 21, one can clearly hear the lyrics of the Crosby, Stills and Nash song "Love the One You're With." Similarly, both parties introduced video recordings into evidence for music events held on Licensee's

⁷ PV Exhibit 1, with a time and date stamp of August 22, 2020 at 3:15 p.m.

premises on June 25, 2022 and July 23, 2022. While Licensee's Reed R8050 device does not exceed 65 decibels during the 10-second clips shared in Licensee's video exhibit, Petitioners' video exhibits indicate the songs can be heard clearly on their property, with the sounds of the drums, guitars and the vocals from singers each clearly heard.

3. Licensee introduced images into the record that establish that Licensee permits entertainment on the outside patio that includes amplifiers and speakers. DPB Exhibit 1 is a video depicting a band playing on Licensee's outdoor stage, and in the video are large black speakers and amplifiers situated around the musicians who are playing their instruments. Petitioners' Exhibit 7 showed several photographs of bands playing at the Licensee's premise, which included microphones, amplifiers and speakers.

4. DPB Exhibits 23, 59 and 72 show recordings of live entertainment measured above 65 decibels on Licensee's outdoor stage. Petitioner Video Exhibits 1 and 5 recorded music from the Licensee in which the words of the songs were plainly evident

5. There were no law enforcement reports related to noise complaints entered into the record by either party.

CONCLUSIONS OF LAW

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

1. Section 304(a)(5) of the Act authorizes the Commissioner to "[o]n petition signed by at least 10 individuals who are residents of the neighborhood, hear complaints in regard to the appointments of, or the conduct of business in, any establishment where alcoholic liquor is licensed

to be sold.” With such petitions, “[t]he burden of proof rests on the complainant to establish allegations” for which relief is sought.⁸

2. A protest is a jurisdictional requirement to cause a hearing to be held so that evidence can be presented on the record; it is not in itself material evidence of opposition.⁹ In this case, numerous protest letters were submitted to this Office. A public hearing was held for this Office to consider:

- a. whether amplifiers and speakers are an authorized use on the Licensee’s outdoor patio;
- b. whether Licensee is permitted to hold no more than two live events per month between April 1 and September 30; and
- c. whether Licensee should be required to remove its fence that encloses part of the Yorklyn Bridge Trail within the space Licensee uses for its outdoor concerts and events.¹⁰

A. Noise Levels on Licensee’s Permitted Patio

3. Petitioners argue music from the Licensee exceeded noise standards and violated the Licensee’s variance for its permitted patio.

4. With respect to these claims, the Commissioner may suspend any license and/or fine any licensee if there are reasonable grounds to believe:

⁸ See *In the matter of: Tortella Enterprises, Inc.*, OABCC License No. 14413, Decision issued Sept. 25, 2015 (citing *Lea v. Griffin*, 1995 WL 106562 (Del. Ch. Feb. 15, 1995)).

⁹ *Alfred I. duPont Sch. Dist. v. Delaware Alcoholic Beverage Control Comm.*, 343 A.2d 600, 603 (Del. Super. 1975).

¹⁰ The Petition also included complaints about parking and traffic related to the Licensee. However, these concerns were not raised during the hearing or in the exhibits. In addition, this Office believes those matters are best addressed with county or local governments and representatives. For these reasons, this Office will not consider parking and traffic for this Decision.

(b)(1) The licensee has violated any provision of this title or any regulation of the Commissioner pursuant hereto; . . .

(b)(5) The licensee maintains a noisy ... establishment

(g) [T]he licensee has operated, caused the operation of or permitted the operation of any stationary source of sound in such a manner as to create an operative average sound level which is equal to or greater than 65 dBA, but less than 75 dBA, when measured at any location 100 feet or more from the licensed premises' real property boundary.

See 4 Del. C. § 561(b) and (g).¹¹

5. The General Assembly chose to limit to taprooms and restaurants this Office's discretion to suspend a license or fine a licensee when sound levels from stationary sources of sound are greater than 65 decibels. Therefore, the scope of this Office's review in this matter is limited to whether the Licensee violated the Act, any Regulation of the Commissioner, or maintained a noisy establishment.

6. The Act does not define a noisy establishment, but Section 561(g) provides some insight for the analysis. Petitioners have the burden of establishing that the Licensee maintains a noisy establishment. While the testimony was focused upon decibel level readings, that evidence would carry greater weight if Section 561(g) applied to the Licensee. It does not. The Licensee also introduced competing evidence that the sound traveling was not so elevated as to create a noisy establishment. Finally, there was no evidence introduced of any police reports relating to noise concerns of the community. Without more, this Office cannot reach the conclusion that Licensee has maintained a noisy establishment.

¹¹ This Office's decision will not be disturbed if there are no errors of law and if substantial evidence exists in the record to support the Commissioner's findings of fact. *Cebriick v. Peake*, 426 A.2d 319, 321 (Del. 1981).

7. A licensee or new applicant for a license is permitted to submit a request for a patio permit that, if granted, is valid for the basic term of the license. 4 Del. Admin. C. § 704(6.0) states that the following is prohibited on a permitted patio:

6.1 No live entertainment on licensed patio.

6.2 No external speakers or amplifiers on licensed patio.

6.3 No audible paging system on licensed patio.

6.4 No wet bar on licensed patio.

Live entertainment,¹² external speakers or amplifiers, paging systems, and wet bars are not permitted on a patio unless an applicant or existing licensee requests a variance for one or all of the items noted above, and those variances are granted by this Office.

8. The Conforming Order, which this Office issued on May 6, 2022, was issued based upon the transcript of the 2018 Protest Hearing held by the Office of Alcoholic Beverage Control Commissioner.¹³ During the 2018 hearing, the Licensee requested an expanded permitted patio, a wet bar, and live entertainment, but did not request or testify with regard to a request for speakers or amplifiers during the 2018 hearing. The transcript from the 2018 hearing stated the application met the requirements for an expanded patio and for approval of the variance requests for live entertainment and wet bar. There was no mention of approval of speakers or amplifiers. During the 2018 protest hearing, the Licensee, engaged in a dialogue with then Commissioner Cordrey, also agreed live entertainment on the patio would cease by 9 p.m.

¹² This Office has interpreted “live entertainment” as including music without speakers or amplifiers and various outdoor games which include cornhole, ping pong, and frisbee.

¹³ The Office engaged in a good faith effort to locate the 2018 decision, including a review of numerous files and records kept by the Office in the usual course of business, but was unable to do so. Absent the original decision from the 2018 protest hearing, the Office determined to issue a conforming order after obtaining a copy of the original transcript from the company that had participated in and transcribed the 2018 hearing.

9. There is undisputed evidence on the record from the August 2022 Hearing that musicians used speakers and/or amplifiers on the Licensee's patio. DPB Exhibits 1 and 5 clearly show speakers and/or amplifiers in use during live music performances on Licensee's outdoor premises.

10. The standard definition for a speaker, also called a loudspeaker, is "an electroacoustic device, often housed in a cabinet, that is connected as a component in an audio system, its function being to make speech or music audible."¹⁴ It is a "device that changes electrical signals into sounds loud enough to be heard at a distance."¹⁵ The definition of an amplifier is "an electronic device (as in a stereo system) for amplifying voltage, current or power."¹⁶

11. To the extent the Licensee suggests the variance for live entertainment inherently implies approval for the use of speakers or amplifiers, this Office disagrees. The Delaware Administrative Code specifically distinguishes between each standard in 4 Del. Admin. C. § 704(6.0), including for live entertainment at Subsection 6.1 and, separately, for speakers or amplifiers at Subsection 6.2. Each standard is numbered individually and stated independently in a complete sentence.

12. This Office's interpretation and application of the separate and distinct variances in 4 Del. Admin. C. § 704(6.0) is consistent with principles of statutory construction because it gives the words "speaker" and "amplifier" used in the Rule their commonly understood meanings. Deciding otherwise by conflating live entertainment with speakers and/or amplifiers would be inconsistent with applying the plain meaning to the words used, would ignore an entire sentence in 4 Del. Admin. C. § 704(6.0), and in so doing would lead to an absurd result.¹⁷

¹⁴ See <https://www.dictionary.com/browse/speaker>.

¹⁵ See <https://www.merriam-webster.com/dictionary/loudspeaker>.

¹⁶ See <https://www.merriam-webster.com/dictionary/amplifier>;
<https://www.collinsdictionary.com/us/dictionary/english/amplifier>.

¹⁷ *Reddy v. PMA Insurance Company et al.*, 20 A.3d 1281, 1287 (Del. 2011).

13. The absurd result principle of statutory construction is “grounded upon ordinary meaning of the words used...”¹⁸ “Statutes are to be construed to achieve a common sense result and to avoid a ... construction which would lead to unreasonable or absurd results.”¹⁹ Licensee’s position is that amplifiers and speakers are inherently included with a variance for live entertainment. However, this argument completely ignores Section 704(6.2), does not afford Section 704(6.2) its plain meaning, would make the language in Subsection 6.2 superfluous, and thus lead to an absurd result.²⁰ Licensee’s argument would violate this principle.

14. Because the Licensee never applied for a variance for speakers and/or amplifiers on its licensed patio, never produced evidence during the 2018 Hearing regarding speakers or amplifiers, and did not produce evidence during the 2022 Protest Hearing that a variance request for speakers or amplifiers had been applied for and been approved previously by this Office, the use of speakers and amplifiers have been and continue to be prohibited. To the extent the Licensee permitted or used speakers or amplifiers on its outdoor patio, that activity must cease immediately.

B. Limits on Outdoor Events

15. The Licensee’s 2018 Protest hearing transcript demonstrates that during the hearing, then Commissioner Cordrey asked the Licensee if it would agree to end all outdoor live entertainment on its patio by 9:00 p.m. and the Licensee agreed. No evidence was offered during the 2022 Hearing to dispute the hours for the variance which permits live entertainment, other than the admission of the 2018 Protest Hearing transcript.²¹ Therefore, this Office concludes this restriction

¹⁸ *Id.* at 1288.

¹⁹ *Tomei v. Sharp*, 902 A.2d 757, 769 (Del. Super. 2006).

²⁰ *Id.*

²¹ P Exhibit 1.

to which Mr. Hoffman agreed in 2018 remains in place and the Licensee must cease all live entertainment outdoors by 9 p.m.

16. During the 2018 Protest Hearing, Mr. Hoffman testified that the Licensee would have approximately 25-35 live entertainment events per year.²² The evidence presented during the 2022 Hearing indicates the Licensee had between 81 to 100 live entertainment events during 2021 alone. Mr. Hoffman testified during the 2022 Hearing that the number of live entertainment events increased significantly because of the pandemic, affording many musicians a place to perform and generate income. While this Office appreciates this explanation, Licensee's testimony during the 2018 Protest Hearing generated some acquiesce from the Licensee's neighbors to the variance request for live entertainment. Without the use of amplifiers and speakers, the sound levels on the permitted patio should be reduced. Therefore, this Office will not limit the specific number of outdoor events Licensee can have on its outdoor patio at this time.

C. Fencing And State Park Trail

17. Petitioners requested this Office to consider requiring the Licensee to remove its fence that encloses part of the Yorklyn Bridge Trail within the space Licensee uses for its outdoor concerts and events. Because this issue is outside the scope of authority of this Office, it will not be considered.

DECISION AND ORDER

IT IS THIS 3rd day of March, 2023, the Decision and Order of this Office that: (1)

²² 2018 Transcript at pp. 17, 37-38.

speakers and amplifiers are prohibited on the outdoor patio at all times; and (2) the Licensee shall ensure all live entertainment/events on the outdoor patio cease by 9 p.m.

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.