



STATE OF DELAWARE
OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER

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MFC Fenwick, LLC
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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 ("Licensee") holds a restaurant license issued by this Office, with an approved patio, and including Sunday sales. The Licensee applied to this Office to alter its existing liquor license, stating in its request that it wished to update its interior floorplan slightly with the addition of eight additional bar seats at the licensed premises, three of which would be positioned at a bar on the first floor, and five additional seats located around the second-floor bar.

2. Licensee's request for alteration to add additional bar seats was noticed to the public pursuant to 4 Del. C. § 524(e)(4).

3. Currently, Licensee is approved for 115 interior dining seats at tables and 27 interior bar seats, with 13 approved bar seats on the first floor and 14 approved bar seats on the second floor. The scope of the hearing related to increasing the amount of previously-approved interior bar seating only; seating and issues related to Licensee's approved outdoor patio were not considered.

4. A valid protest was filed against the application, requiring a public hearing on the application. See 4 Del. C. § 541.

5. The Commissioner held a public hearing on the protested application on April 12, 2023 at 5 p.m. via Webex, in accordance with Delaware law.

6. Exhibits 1 through 15 were noted for the record.

7. Vincent Robertson, Esquire, with the law firm of Parkowski, Guerke & Swayze, P.A., represented the Licensee.

8. Two persons who signed or submitted a protest against the application pre-registered to testify and appeared at the hearing.¹

9. Licensee's manager, Matthew Patton, testified the requested eight additional bar seats would serve guests better and assist employees. Mr. Patton testified that his restaurant caters to patrons who wish to dine, and not just consume alcoholic beverages. Mr. Patton described the restaurant as a chef-driven, family-owned restaurant, and noted that people sometimes prefer to eat a complete meal while seated at the bar instead of at a table. Mr. Patton testified that bar patrons are almost always ordering food - either complete meals or appetizers if they're waiting for a table. He further testified that the additional bar seats would accommodate this customer demand as well as provide additional seating for patrons waiting for a table.

10. The two protestors testified about their concerns that additional bar seating would detract from the restaurant's primary purpose of serving complete meals and that it would increase alcoholic beverage consumption. The protestors testified that the Town of Fenwick Island is a quiet community that is primarily residential.

11. Mr. Patton testified the Licensee has endeavored to keep noise at the premises to a reasonable level and that the addition of eight interior bar seats to a restaurant with 115 interior

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: Jonathan Welsh and Janice Bortner. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993).

dining seats already approved by this Office would not create an additional burden on the community.

12. Licensee's counsel acknowledged that the Licensee's request to increase bar seating as part of the proposed interior alterations would violate 4 DE Admin. Code § 202 3.1 which requires a restaurant's floor plan to maintain a dining to bar seat ratio of 4 dining seats to 1 bar seat. As a result, Licensee requested a variance to Rule 202 3.1 to permit the eight additional bar seats requested.

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. Minimal evidence was presented by the community against the application for increased indoor bar seating.
3. No comments were made with respect to the Applicant's request for variance to 4 DE Admin Code § 202 3.1 to permit the additional eight bar seats.
4. Most, if not all, of the concerns raised by the two protestors focused on noise in a quiet beach resort town, parking issues, and related 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).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 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 additional bar seating as part of an indoor alteration, as requested here, are set forth in 4 Del. C. Ch. 5, and 4 DE Admin. Code §§ 202, 703 and 704. The Act authorizes denial of an alteration request 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, the evidence from the protestors did not amount to a “substantial objection” to the Licensee’s request to alter its interior floor plan to add eight additional bar seats. The concerns expressed by two persons related primarily to traffic and parking congestion which are issues outside the scope of this Office’s authority, and do not amount to a substantial objection when the record reflects that over 400 persons who live or own property within one mile of the Licensee were notified of the Licensee’s request to increase its bar seating.

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).

5. Last, this Office is satisfied the Licensee has established good cause for approval of its request for variance to Rule 202 3.1 to permit the addition of eight bar seats, three located at the first floor bar and five at the second floor bar. While this modification is a slight reduction to the current 4:1 dining seat to bar seat ratio required by Rule 202 3.1, it meets the demand of consumers who want the choice to eat complete meals while seated at the bar. The Licensee is expected to comply with all other requirements of a restaurant license, including that no more than 40% of its gross monthly proceeds come from the sale of alcohol, and that the restaurant must provide complete meals at all times it is open.⁴

DECISION AND ORDER

IT IS THIS 8th day of June, 2023, the Decision and Order of this Office that the application for alteration of the licensed premises to add 8 additional interior bar seats to the current approved floor plan, which includes 115 interior dining seats and 27 interior bar seats, is approved. Of the 8 additional interior bar seats, 3 seats are added on the first floor for a total of 17 seats downstairs and 5 additional seats on the second floor for a total of 18 bar seats upstairs. With this approval, there will be a total of 115 interior dining seats and total of 35 interior bar seats. The approval is subject to a final inspection by a representative of this Office.

IT IS SO ORDERED.



The Honorable Jacqueline Paradee Mette, Esq.
Commissioner

⁴ This Office recently proposed changes to the Rule requiring the 4:1 dining seat to bar seat ratio, due to similar requests to this Office and to respond to changing consumer demands for increased dining options at restaurants.

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.