



STATE OF DELAWARE
OFFICE OF THE ALCOHOLIC BEVERAGE CONTROL COMMISSIONER

Yellowfin's OV, LLC :
t/a Yellowfin's Bar & Grill :
695 Bethany Loop, Unit 1 :
Bethany Beach, DE 19930 :

DECISION AND ORDER

SUMMARY OF EVIDENCE

1. The above entity ("Applicant") filed an application for a restaurant liquor license with Sunday service and sales. The application also included a request for a patio license, with variances to permit external speakers for solo acoustic music.
2. Protests were received within thirty days from the filing of the application, requiring a public hearing on the application. 4 Del. C. §541.¹
3. The Commissioner held a public hearing on the protested application on September 6, 2023 at 5:00 p.m. via Webex, in accordance with Delaware law.
4. Exhibits 1 through 45 were noted for the record.
5. Applicant's public notice of the application, published in two newspapers of general circulation, stated Applicant was applying for a restaurant liquor license with an outdoor patio, and request for speakers, live entertainment, and a wet bar on the patio. The public notice was mailed to over 400 addresses that were within one mile of the location of Applicant's premises.
6. Josh Fallon, the sole member of Applicant, represented the Applicant.
7. Several persons who signed or submitted a protest against the application appeared at the hearing.²

¹ Untimely protests were also received, but were not considered by this Office.

² 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

8. Applicant testified that his original business plan to include a wet bar on the patio, which was publicly noticed in Applicant's newspaper publications in 2022, was revised during construction, and was eliminated. Therefore, no wet bar was considered during the hearing.

9. Applicant testified he met with local, concerned citizens to discuss his plans for the restaurant and patio.

10. Applicant testified that small external patio speakers would be placed on the exterior walls of the restaurant, facing downward. Background music playing inside the restaurant would play on these speakers and would complement the guests' dining experience.

11. Applicant testified the company runs family-centered restaurants that have not had noise complaints. Applicant testified the restaurant hoped to hire either a single musician or a duo that would play music during hours typical for happy hour events.

12. Applicant testified at length about decibel levels and how sound travels certain distances and reverberates off structures, noting that rock bands play at 110-115 decibels, and testified that live music on the restaurant's proposed patio would have limited impact on the registered protesters' use and enjoyment of their properties.

13. Individuals who signed up to testify in favor of the application testified that the restaurant and outdoor music on the patio would be a welcome addition to the community.

14. Nine protestors testified about their concerns over loud noise from the proposed external speakers and live entertainment on the proposed patio. While the protestors testified against the Applicant's request for patio variances, there was no testimony against the restaurant or the patio.

15. One protester testified, allegedly, on behalf of a neighborhood, but was the only person who testified on the record for that neighborhood.

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: Marc Bloom, John Cuellar, Susan and Paul Fischer, Debbie Christie, Stephen Guthrie, Phillip Hamilton, Lee Irving, Bill Kroll, Jeremy Tsiopanas, Michael Silverman, Craig Wishner, and Joe Mignogna. *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993).

16. The protesters testified as to concerns regarding the sound from live music on the patio which would disturb their quiet enjoyment of their properties and have a negative impact on their property values. There was no concern with live music playing inside the premises. During the protesters' testimony, there was lengthy discussion between the protesters and the Applicant regarding the hours of outdoor music on the patio, with requests from the protesters that Applicant cease live music on the patio at 9:00 p.m. After discussion between the protesters and the Applicant, the Applicant agreed to discontinue live music on the patio at 9:00 p.m., reserving the ability to have live music play after 9:00 p.m. during nonprofit fundraising events hosted on 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. Applicant withdrew the request for a wet bar on the patio.
2. Only protestors who lived or owned or resided on property within a mile of the proposed premise testified at the public hearing.
3. The concerns raised by the protestors focused on anticipated levels of noise that would emanate from the proposed patio because of the external speakers and live entertainment on the proposed patio.
4. Several protestors also raised concerns about available remedies should noise become a problem.
5. The Applicant stipulated that live entertainment on the outside patio would conclude at 9 p.m. with the exception that nonprofit fundraising events, held a few times per year, may end later than 9:00 p.m.
6. Applicant stated the outdoor speakers mounted on the wall would play the background music playing inside the restaurant.
7. No evidence was presented against the application for the restaurant.

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. 4 Del. C. § 304(a)(4).³

2. A protest is a jurisdictional requirement to cause a hearing to be held in order for evidence to be presented on the record and is not in itself material evidence of opposition.⁴ In this case, several protest letters were timely submitted to this Office. A public hearing was held in order 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 restaurant license are set forth generally in 4 Del. C. §§ 511 and 512, while the requirements for a patio permit and variances are set forth in 4 Del. Admin. Code § 704. Title 4 provides that an application must be refused for various reasons as stated in Section 543. One such basis is Section 543(b)(11)(b):

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.

4. No protestor or other property owner or resident within one mile of the Applicant’s proposed premises presented any evidence into the record during the hearing against the application for the restaurant or the outside patio.⁵ Indeed, the testimony from protesters welcomed the new restaurant and its plans for interior musical entertainment and outdoor dining.

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).

⁵ *Newsome v. Delaware Alcoholic Beverage Control Comm.*, 1993 WL 258712 at *2 (Del. Super. July 1, 1993)(person acting as “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).

5. The protestors testified about their concerns regarding anticipated noise from the patio if the variances for external speakers and live entertainment were granted, arguing the anticipatory noise would decrease the value of their properties and negatively impact the quality of their lives.

6. During the hearing, Applicant agreed to end live music on the patio at 9:00 p.m., except during nonprofit fundraising events hosted on the premises. The Applicant did not agree to turn the speakers, to be mounted to the restaurant's exterior walls, off at 9:00 p.m., stating that the mounted speakers would be used to play the same background music playing inside the restaurant.

7. Applicant testified at length about decibel levels and the distance sound travels at various decibel levels. Lacking any additional testimony as to Applicant's expertise in the field of sound engineering, including any specific training or education, such testimony was given limited weight.

8. Based upon the evidence presented, this Office concludes the application meets the requirements of a restaurant license and also meets the requirements for a patio permit.

9. This Office also concludes the application meets the requirements for the two requested variances, as the Applicant showed good cause in the record during the hearing: that the live entertainment and external speakers will help provide ambiance on the patio and contribute to guests having an enjoyable dining experience. The evidence put forth against granting the variance requests for live entertainment and speakers on the proposed patio by nine persons does not rise to the level of a substantial objection by the community that the quality of life will be adversely affected. Therefore, this Office approves the patio permit and variances for external speakers and live entertainment, subject to and including the concession agreed to by Applicant during the hearing that live entertainment will conclude at 9 p.m. unless Applicant is hosting a nonprofit fundraiser on the premises and the event does not conclude at 9:00 p.m.

10. The Liquor Control Act permits suspension and/or fines of a restaurant liquor license should noise levels from a stationary source of sound exceed 65 decibels when measured at any location 100 feet or more from the licensed premises' real property boundary. See 4 Del. C. §561(g). Delaware's Division of Alcohol

& Tobacco Enforcement is authorized to investigate potential violations of the Act should concerned citizens determine such investigation may be warranted.

DECISION AND ORDER

IT IS THIS 22nd day of September, 2023, the Decision and Order of this Office that the application for restaurant, patio permit and variances for external speakers and live entertainment are approved, subject to and including the following conditions: 1) ambient music will be played on the external wall speakers; and 2) live entertainment will conclude at 9 p.m. unless Applicant is hosting a nonprofit fundraiser and the event does not conclude at 9:00 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

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.

