

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

PAON Carlsbad LLC
Dba 83 Degrees
660 Carlsbad Village Dr.
Carlsbad, CA 92008-2305

Licensee(s).

File: 47-510535

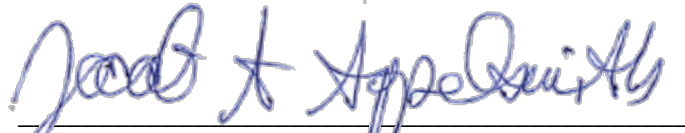
Reg: 17085320

**PRECEDENTIAL DECISION
No. 18-01-E**

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated December 20, 2017, in the above-referenced action.

This decision is designated precedential effective September 4, 2018.



JACOB APPELSMITH, Director
Department of Alcoholic Beverage Control

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PETITION OF: **File No.: 47-510535**

PAON Carlsbad LLC
83 Degrees
660 Carlsbad Village Drive
Carlsbad, CA 92008-2305

Reg. No.: 17085320

FOR THE MODIFICATION OF
CONDITIONS ON THE ON-SALE
GENERAL EATING PLACE LICENSE

Licensee(s).

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on December 20, 2017, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on May 23, 2017, before Administrative Law Judge (“ALJ”) John W. Lewis, and good cause appearing, the following decision is hereby adopted:

Oral and documentary evidence was received at the hearing, and the matter was argued and submitted for decision on May 23, 2017.

FINDINGS OF FACT

1. In 2011, the Department issued a conditional, On-Sale General Eating Place license to the licensee for its premises located at 660 Carlsbad Village Drive in Carlsbad, California. The licensee agreed to and did execute a Petition for Conditional License setting forth four (4) conditions restricting its license privileges, and these conditions were subsequently endorsed upon the license. (Exhibit 2)
2. In the Petition for Conditional License, the petitioner/licensee acknowledged, in part, the following:

WHEREAS, the proposed premises are located in Census Tract 179.00 where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business & Professions Code; and,

WHEREAS, the petitioner(s) stipulate(s) that by reason of the aforementioned over-concentration of licenses, grounds exist for denial of the applied-for license.

3. Included among those four (4) conditions is a restriction on the hours of operation which states:

1. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 AM and 12:00 Midnight each day of the week.

4. The Department approved the issuance of the license subject to the four (4) conditions outlined in Exhibit 2. On or about March 6, 2015, the licensee petitioned the Department for the modification of condition number one (Exhibit 1). The licensee requested that the hours permitting sales, service and consumption of alcoholic beverages be changed to 11:00 AM until 2:00 AM. On February 1, 2017, the Department denied the requested modification of condition number one (1) because “the granting of your petition would render the continuance of your license contrary to public welfare and morals within the meaning and intent of Article XX, Section 22 of the Constitution of the State of California and of the Alcoholic Beverage Control Act, Business & Professions Code Sections 23800-23801, in that the grounds which caused the imposition of the condition(s) continue to exist.” The petitioner/licensee subsequently requested a hearing. See Exhibit 1.

5. Department Licensing Representative Irene Sonoda (Sonoda) was assigned to investigate Petitioner/Licensee’s request to modify the conditional license.

6. Eight On-Sale licenses are permitted in the census tract in which the premises is located. Twenty-eight licenses exist in this census tract. There continues to be an undue concentration of licenses in this census tract.

7. Business & Professions Code Section 23803 requires that the Department notify the local governing body of any proposed removal or modification of conditions. Licensing Representative Sonoda sent a letter to the Carlsbad City Council advising of the requested change in conditions. The Carlsbad City Council did not respond. Licensing Representative Sonoda did have contact with Mr. Austin Silva of the Carlsbad Planning Department. Mr. Sliva told LR Sonoda the City considers any restaurant open after midnight to be a bar and the City does not allow bars in the downtown area.

8. At about the same time as the licensee filed the petition, they contacted the Carlsbad Police Department to determine if the Police Department was opposed to the condition modification.

Carlsbad Chief of Police Gary W. Morrison sent a letter to the Department explaining why the Police Department supported the requested condition modification. See Exhibit A.

9. On or about June 16, 2016, the Department issued a Type 41 On-Sale Beer & Wine Eating Place License to Ritalben Inc. (41-558796). This was a person to person license transfer and the same conditions on the prior license were brought forward to this license. There is no time restrictions on this license (Exhibit B).

10. On or about July 25, 2016, the Department issued a Type 47 On-Sale General Eating Place license to Ritalben Inc. (47-564131). This was a new license. The petition for conditional license does indicate that the census tract, which is the same as Petitioner PAON Carlsbad LLC, is overconcentrated with On-Sale licenses. Condition 1 on that license states that sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 8:00 AM and 1:00 AM each day of the week (Exhibit C).

11. On or about September 29, 2016, the Department issued a Type 41 On-Sale Beer & Wine Eating Place License to California Dave Inc. (41-563738). That petition for conditional license does indicate that the census tract, which is the same as Petitioner PAON Carlsbad LLC, is overconcentrated with On-Sale licenses, Condition 1 on that license permits sales, service and consumption of alcoholic beverages between 7:00 AM and 1:00 AM Sunday through Wednesday and between the hours of 7:00 AM and 2:00 AM Thursday, Friday and Saturday (Exhibit D).

12. According to Exhibit 4 (the "1,000 foot radius map"), there are 22 ABC-issued licenses located within 1,000 feet of Petitioner's premises. Most of these hold either a Type-41, on-sale beer and wine eating place, or a Type-47, on-sale general eating place, license. Other than the three petitions for conditional license identified with particularity in the record in this matter, no evidence was presented about what conditions, if any, are attached to any of the other 19 licenses.

13. In response to questioning by the ALJ as to why, while the subject Petition for Modification was pending, the two licenses referred to in paragraphs 10 and 11 above issued with less restrictive hours conditions than the subject license (specifically, license numbers 564131 and 563738), LR Sonoda responded that the District Office had "become less restrictive on conditions to avoid further denials on condition modifications."

14. LR Sonoda further testified that while the City Planning Department had not objected to later hours on the two licenses subsequently issued, it continued to object to a modification of the hours on the subject license to extend to later in the evening. LR Sonoda also testified that the City Planning Department had advised her (apparently in connection with other matters, not this petition specifically) that it would not object to later hours for alcohol service if the business

operated its kitchen and maintained a full menu and service of meals past midnight. These other licenses, however, have no conditions regarding food service beyond the condition requiring that the quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The subject license has an identical gross sales condition.

15. Except as set forth in this Decision, all other contentions of the parties lack merit.

DETERMINATION OF ISSUES

1. Article XX, Section 22 of the California Constitution provides that the Department of Alcoholic Beverage Control has the power, in its discretion, to deny an application for an alcoholic beverage license if it determines for good cause that the granting of the license would be contrary to public welfare or morals.
2. California Business and Professions Code Section 23800 provides that “[t]he department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges . . . [i]f grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions. . . .”
3. California Business and Professions Code Section 23803 provides that “[t]he department, upon its own motion or upon the petition of a licensee . . . , if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal.”
4. The evidence presented at the hearing did establish that the census tract where the premises is located does in fact have an undue concentration of on-sale licenses. Petitioner acknowledges that this is indeed a true analysis of the evidence.
5. At the time the license was issued, grounds existed for the imposition of conditions, including the condition sought to be modified here. The issue now before the Department is whether those grounds, within the meaning of Section 23803, “no longer exist.” In evaluating this, if the factual bases for a certain “whereas clause,” such as the undue concentration clause here, remain, that is a factor supporting the conclusion that the grounds still exist. That does not, however, necessarily end the inquiry.
6. When an application for a license is made, that application is properly investigated independently. The determination as to whether conditions are necessary to mitigate a concern and, if so, whether they are reasonable and appropriate, and how those conditions are structured, is distinct as to each license issued. The Department can, for example, deny an application when there is an undue concentration of licenses, or the Department can grant a license despite such an undue concentration by imposing various conditions (or no conditions at all). If the Department

does impose conditions, there are many considerations in deciding, under the totality of circumstances, what conditions to impose and their wording. Similarly, in evaluating a petition for condition modification, in determining whether the grounds supporting a condition “no longer exist,” the Department will look to the totality of circumstances. The factual bases for a “whereas clause” is one circumstance to consider.

7. The fact that the Department has recently issued licenses without the hours-restriction condition sought to be modified here, including two licenses issued during the pendency of this matter, is another such circumstance. That said, the fact that other nearby licenses were issued with different hours restrictions than the license here is, without more, not a justification to remove or modify the condition given that each application is evaluated independently. For example, the other licenses identified in this case do not have identical hours conditions. Indeed, although the licensee here seeks to exercise its license privileges until 2:00 AM each day of the week, both of the other licenses issued while this petition was pending are restricted to 1:00 AM, with one of those licenses also being authorized to exercise its license privileges until 2:00 AM on Thursday, Friday and Saturday nights. The third license identified (in Finding of Fact 9), which had its conditions carried forward due to a license transfer, does not have any restriction on hours at all. It is overly simplistic to assert that all licenses in the vicinity should have the same conditions. Without more, simply arguing that it is unfair to have different operating conditions does not satisfy the licensee’s legal burden under section 23803. If that is all that is required, licensees could pick and choose which conditions they want on their license based upon what other licensees close by have on theirs. This would fundamentally defeat the particularized assessment of the appropriateness of conditions on individual licenses without regard for all surrounding factors.

8. In this case, the record establishes something more than the mere fact of different conditions on other licenses. As indicated, several licenses were issued authorizing later hours than on the subject license while this petition for modification was pending. The Licensing Representative testified that the District Office is being “less restrictive” on such conditions, and to her understanding the City Planning Department did not object to the later hours for those other licenses because they operated their kitchens and offered food service after midnight. Given that the license here has the identical condition as to food service as the licenses the City Planning Department found unobjectionable, and that the licensee here also intends to serve food after midnight, any concern of the City Planning Department does not militate against the condition modification sought. Other factors to consider in evaluating the totality of circumstances here include the licensee’s testimony that the area in which the premises is located has grown, that the Police Department supports the modification of the condition, that there is no apparent opposition (other than that based upon a phone call with the Planning Department), and that there are no nearby residents who may be disturbed by the later operation of the business.

9. Based upon the totality of circumstances, it appears in this case that the original grounds for imposition of the condition as to the restriction on the late night sale and service of alcoholic beverages to midnight each day of the week have substantially changed to the point that it can be reasonably concluded that they no longer exist.

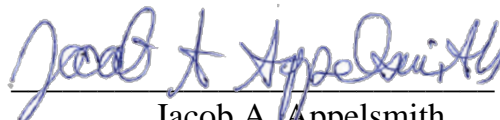
ORDER

The Petition is hereby granted. Petitioner is required to execute a new Petition For Conditional License that contains the same information as Exhibit 2 except that Condition 1 shall read as follows:

1. Sales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 AM and 2:00 AM each day of the week.

Sacramento, California

Dated: December 20, 2017



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.