

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

IN THE MATTER OF THE PROTEST OF:

Brian Byrne, et al.

Against The Issuance Of A Type-41 License To:

Naples SF, LLC
Dba Naples of Union
2136 Union Street
San Francisco, CA 94123

Applicant(s).

File: 41-570636

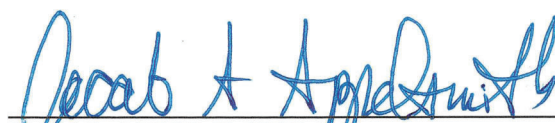
Reg: 16085171

**PRECEDENTIAL DECISION
No. 19-01-L**

DESIGNATION AS PRECEDENTIAL DECISION

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated November 3, 2017, in the above-referenced action.

This decision is designated precedential effective April 12, 2019.



JACOB APPELSMITH, Director
Department of Alcoholic Beverage Control

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To:

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DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on November 3, 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 April 12, 2017, before Administrative Law Judge David W. Sakamoto, and good cause appearing, the following decision is hereby adopted:

ISSUES TO BE DETERMINED

The issue to be determined is whether granting the applied-for license would be contrary to public welfare or morals by reason of Article XX, section 22 of the Constitution of the State of California and Business and Professions Code section 23958 because issuance of the license would create or aggravate interference with nearby residents' quiet enjoyment of their homes by generating or facilitating undue noise and an undue invasion of privacy. During the hearing, the Protestant, Brian Byrne, clarified that his opposition is primarily focused on the licensing of the rear deck and rear patio. He did not oppose the Department licensing the enclosed premises building or the small patio area on the south, or opposite, side of Applicant's building, adjacent to Union Street.

FINDINGS OF FACT

1. Applicant applied for a Type 41 On-Sale Beer and Wine Eating Place license for its premises at 2136 Union Street, San Francisco, California. A Type 41 license permits the holder to sell, serve, and permit consumption of beer and wine on the licensed premises which must also

operate as a bona-fide eating place as described in section 23038. On behalf of the Department, Licensing Representative Arnel Junio investigated Applicant's application.¹ (hereafter "L.R. Junio")

2. Applicant's premises will operate as a full service restaurant featuring primarily Italian dishes. It will have a wine bar and offer craft beers. The applied for premises is on the north side of Union Street. Its main entrance faces Union Street. The total applied for premises area is approximately 136 feet long and approximately 25 feet wide. The proposed licensed premises space includes four components. (Exhibit 2, attachment A: ABC-257 Diagram of Licensed Premises).

3. The first component of the applied for premises is a small patio area on the south or Union Street side of Applicant's main building. The patio occupies a 25 foot wide by 4 foot long space and sits immediately between Union Street and the premises' main building. This area would be for sidewalk dining.²

4. The second component is the premise's main building containing a dining area, a kitchen, a fixed wine bar, a storage area, a walk-in cooler, and restrooms. It is approximately 25 feet wide and 82 feet long. The main public entrance to the building is off of Union Street through the small patio dining area.³

5. The third component to the applied for premises is an open air deck approximately 24 feet long and 25 feet wide adjacent to the north side of the premise's main building. It is on the same elevation as the main premises building and front patio. Access to the deck is through a doorway on the north side of Applicant's main building. The deck has no roof. A handrail runs east and west across the north side of the deck. Currently, the Applicant has two long tables and two smaller tables on the deck that collectively seat approximately 18-20 patrons. On the north side of the deck is a staircase that leads from the deck down one floor's distance to a patio below. The deck does not overlap or cover over any part of the open air patio.

6. The last component of the applied for premises is the open-air patio area north of and at a lower elevation than the rear deck. It is approximately 30 feet long and 25 feet wide and has a capacity of approximately 15-20 patrons. It is at the most northern portion of the applied for premises area. It is fully landscaped including some built in benches. A fence or wall encloses the patio, but it has no roof of any kind. (Exhibit P-13, photo of patio area). There is no other access way to the patio other than the staircase that connects the deck to the patio. Immediately north of and adjacent to the patio is a neighboring residential property owned and occupied by Mr. and Mrs. Fong. Applicant plans to use the deck and patio on a regular basis. While there will be full food service on the deck, it is not anticipated the lower patio will be used for food

¹ L.R. Junio testified at the hearing regarding his investigation.

² The Protestant did not oppose this portion of the applied for premises being licensed.

³ The Protestant did not oppose licensing of the premises building.

service because it would be too difficult for servers to carry the food down the rear deck stairway. The lower patio may be used as a waiting area or lounge type area.

7. None of the other operating licensed premises in this area have a rear deck and/or rear patio area.⁴

8. The general neighborhood where Applicant's premises is located has a mix of commercial and residential uses. Union Street in this area is a two lane street with street parking on each side of the street.

9. Beatrice Stavriniades held a Type 41 license at this premises building from 1995 to 2015 with no history of disciplinary action. Her licensed premises consisted only of the building and did not include the front patio, rear deck, or rear patio. The evidence indicated that she may have occasionally used the rear deck for patrons. The Applicant did increase the size of the deck because it had to accommodate an existing large tree and a required 4 foot staircase landing.

10. There were no hospitals or churches in the immediate area of Applicant's premises. Further, there were no public playgrounds or non-profit youth facilities within 600 feet of Applicant's premises. The Tule Elk Park School at 2110 Greenwich Street, San Francisco, was approximately 590 feet from Applicant's premises. The Department sent the school a contact letter regarding the application, but received neither objection nor protest from that school against the application.

11. Applying the standards and criteria set forth in section 23958.4, the United States Census Tract where Applicant's premises is located permits 14 on-sale licenses and 31 have already been issued. (Exhibit 2, pages 2-3)

12. The San Francisco Police Reporting District where Applicant's premises is located is a high crime reporting district because as the average number of crimes and arrest for San Francisco Reporting Districts is 81 per district, Applicant's reporting district had 122 or 150% of the average.⁵

13. Under section 23958.4, even if Applicant's site is in a high crime reporting district or over concentrated census tract, an added Type 41 eating place license may be granted if doing so serves "public convenience or necessity". In this instance, the Department determined the premises is in a highly populated and busy corridor in San Francisco. Applicant offers fresh pasta, house-cured meats, wood-fired oven roasted vegetables, authentic Neapolitan pizza, and

⁴ There is one facility that has a similar deck or patio, but it is closed/vacant.

⁵ Under section 23958.4, a premises is located in a high crime reporting district if the reported crimes and arrest in that district exceed 120% of the average of all reporting districts for that city or county. Applicant's reporting district had 150% of the average, so it was a high crime reporting district.

craft beer and wine. While there are other types of restaurants in the immediate area, the next closest premises that offers Italian food is 2-3 blocks away and though it does serve meals too, it is also more of a market and deli facility. (Exhibit 2, page 3-4) The Department determined that Applicant would fulfill a public convenience or necessity enough to warrant issuance of a license.

14. The San Francisco Police Department protested the issuance of an unconditioned license to Applicant. However, it indicated that if certain conditions were added to the license, their protest could be deemed withdrawn. The police sought the following conditions to be imposed on the license:

1. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 8:00 a.m. to midnight Sunday through Wednesday, and 8:00 a.m. to 1:00 a.m., Thursday through Saturday.
2. Full meal service must be made available at all times that the premises is exercising the privileges of its ABC license until at least one-half hour prior to the cessation of the exercise of the privileges of the ABC license.
3. The sale of alcoholic beverages for off-sale consumption is strictly prohibited.
4. The petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control, as depicted on the ABC-257 dated 6/16/16.
5. No noise shall be audible beyond the area under the control of the licensee(s) as depicted on the ABC-257 dated 6/16/2016.
6. Sales, service and consumption of alcoholic beverages shall be permitted on the rear-exterior patio area only between the hours of 8:00 a.m. and 9:00 p.m., Sunday through Wednesday and 8:00 a.m. and 10:00 p.m., Thursday through Saturday.
7. Graffiti shall be removed from the premises and all parking lots under the control of the licensee within 72 hours of application. If the graffiti occurs on a Friday or weekend day, or on a holiday, the licensee shall remove the graffiti within 72 hours following the beginning of the next weekday.
8. Loitering (loitering is defined as “to stand idly about; linger aimlessly without lawful business”) is prohibited on any sidewalks or property adjacent to the licensed premises under the control of the licensee(s) as depicted on the ABC-257 dated 6/16/16.
9. The exterior of the premises shall be equipped with lighting of sufficient power to illuminate and make easily discernible the appearance and conduct of all persons on or

about the premises. Additionally, the position of such lighting shall not disturb the normal privacy and use of any neighboring residences.

10. Sales, service and consumption of alcoholic beverages shall be permitted on the sidewalk seating area only between the hours of 8:00 a.m. and 10:00 p.m., each day of the week.

11. Applicant(s) has/have been issued and will comply with the provision of the Department of Public Works Tables & Chairs Permit issued pursuant to Article 5.2 of the Public Works Code.

12. Applicant(s) will maintain the Department of Public Works Tables & Chairs Permit and keep a copy of same and any revisions thereto, on the premises at all times and will make said permit available for immediate inspection by any law enforcement personnel upon request.

13. Applicant(s) will provide the Department with a copy of the Department of Public Works Tables & Chairs Permit and any approved revisions to said permit prior to the effective date of the revision.

14. Sales, service, and consumption of alcoholic beverages shall only be allowed on the sidewalk seating area of the premises to patrons seated at tables and chairs authorized by the Department of Public Works Tables & Chairs Permit.

15. The licensee or an employee of the licensee will monitor sidewalk seating and rear-exterior patio areas at all times that alcoholic beverages are being served or consumed, to ensure that the premise will operate in compliance with all applicable laws and /or conditions.

Applicant agreed that if the license was issued, it would be subject to those conditions specified above requested by the police department. Applicant signed and submitted to the Department a Petition for Conditional license with the above conditions. (Exhibit 2, attachment D)

15. The Department located 40 residences within 100 feet of Applicant's premises. Applicant sent notice of their application to those residences on July 7, 2016 and August 30, 2016. The Department sent notice of the application to those residences on August 26, 2016 and October 21, 2016. (Exhibit 2, page 4-6) The Department received one protest from Brian Byrne in response to the notices. He asserted that use of the rear deck by the premises would generate too much noise and invade his privacy.

16. Applicant indicated in a letter to the Department that in order not to disturb neighbors it would keep the volume of their sound system very low. It also indicated that it would agree to

conditions on the license recommended by the San Francisco Police Department. Lastly, Applicant stated it will add at least 5 new jobs for the neighborhood and that added foot traffic in the area will make it safer. (Exhibit 2, Applicant's July 1, 2016 letter to Department)

17. In the Department's Report, in addressing the issue of potential disturbance to nearby residents, it assessed Applicant as an experienced restaurateur who is committed to minimizing any disturbances it might generate and such was evidenced by Applicant's other restaurant that had no report of disciplinary action.

The Department also indicated there was a 6 foot wooden fence with 2 feet of wooden lattice, a large tree, and another residence between Protestant Byrne's residence and Applicant's premises that would help insure nearby residents' quiet enjoyment of their property. (Exhibit 2 page 6)

18. L.R Junio made three separate visits to the premises during the course of his investigation. During his first visit on July 5, 2016, he was able to hear street traffic, construction noises, and deliveries being made. On October 21, 2016, he made a second daytime visit to the premises during which he heard ambient street noise, buses, traffic, and noise from a nearby construction site. He also stood on Applicant's rear deck, but only heard noise from the nearby construction site. He observed a residential neighbor reading while in a hammock and noted that she did not seem to be disturbed by his conversation with Applicant. On L.R. Junio's third visit on October 28, 2016, he heard the same ambient noises he heard on prior visits. He did hear some modest noise emanating out of an open rear door to a neighboring restaurant known as the Brixton. (Exhibit 2, page 8) L.R. Junio recommended issuance of the license subject to those conditions requested by the police department and agreed to by Applicant.

19. In October 2016, the Department issued Applicant an interim operating permit that allowed Applicant to temporarily exercise the privileges permitted under a Type 41 license.

20. Since 2006, Protestant Byrne has lived at 2129 Fillbert Street. He lives on the third floor of his condominium building. Filbert Street runs east and west and is the street north of, and parallel to, Union Street. The rear of protestant's third floor condominium faces the rear of some of the Union Street properties, including Applicant's site. Protestant's rear bedroom and living room have a view of Applicant's deck and patio that are approximately 75 feet away. (Exhibit P-1, P-4, and P-6, photos)

21. Protestant testified that the prior restaurant operator at Applicant's site did not use the rear deck or patio to any significant degree. At that time, the deck was somewhat smaller and was used in a very unobtrusive manner. At most, it was irregularly used on weekend mornings, but not in such a way as to disturb the quiet enjoyment of his property. The prior owner would cease business activity in the mid or late afternoon.

22. Since Applicant has begun to use the rear deck and patio, Protestant has often been disturbed by varied noise emanating from that area of Applicant's premises. He has heard such

sounds as loud voices, persons laughing or screaming, the noise from dishes being handled, the noise of garbage cans being taken up and down the rear staircase, and the noise of those maintaining and cleaning the deck and patio.

He contended that issuance of a permanent ABC license will only exacerbate those problems. On at least three occasions, Protestant has called the police to report and complain regarding excessive noise coming from Applicant's rear deck or rear patio.

23. Helen Fong and her husband have resided at 2135 Filbert Street the past 15 years.⁶ They own the property upon which there are two residences. There is one residence on the northern portion of the parcel that faces Filbert Street. It is a rental unit. The Fongs reside in a separate residential unit on the south end of their parcel furthest from Filbert Street. The Fongs share a common 25 foot long east-west property line with the applied for premises. The Fongs and Applicant each have a fence on that property line that run parallel one other. The Fong's fence appears to be about 6' tall. The Applicant's fence along their south property line in their patio is not as tall as the Fong's fence.

24. The Fong's kitchen and small patio area are on the southernmost portion of their residence. Looking south from that location, there is a basically unobstructed view of the Applicant's deck, which is at a higher elevation, approximately 7-8 feet, compared to the Fong's residence.⁷ (Exhibit P-8 and P-15 photos). Applicant's lower level patio is just on the other side of the fences separating the two properties.

25. Mrs. Fong testified that the prior restaurant operator at Applicant's site did not use the rear deck very much and it was not observable from her home. When the prior operator did occasionally use the deck, it did not disturb the quiet enjoyment of her residence. The rear deck was not a primary feature of the prior operator's business activity.

26. Since Applicant's have operated at this site, she and her husband have been greatly disturbed by various noise and activity occurring on Applicant's rear deck. She testified that she has heard loud voices, laughter, and music coming from the deck. She also is disturbed by the noises cause by employees setting up for functions at the premises and who travel up and down the rear staircase. She is also disturbed by the noise of employees or patrons moving furniture around on the deck area and trash cans being brought up and down the rear staircase. She is also greatly disturbed by that fact that the now extended deck permits persons on the deck the ability to directly view down into her patio area and kitchen, thus making her feel as though she lives in a "fishbowl". Lastly, she is also disturbed by the fact that she now has a full view of whatever debris, refuse, trash cans, supplies, merchandise, boxes or other items Applicant keeps or stores on the deck.

⁶ Helen Fong testified at the hearing as a witness for the Protestant. She is obviously a resident within 100 feet of Applicant's applied for premises.

⁷ This is an estimation based upon the testimony and photos as no party established the exact elevation difference.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution delegates the exclusive power to license the sale of alcoholic beverages in this state to the Department of Alcoholic Beverage Control.
2. In a protest matter, the applicant bears the burden of establishing that it is entitled to an alcoholic beverage license from the start of the application process until the Department makes a final determination.⁸ However, a protestant has their own burden of proving up the merits of their protest.
3. Business and Professions Code section 23958 requires the Department conduct a thorough investigation to determine, among other things, if the applicant and the Proposed Premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application which may affect public welfare or morals. It provides, in part, that the Department shall deny an application for a license if the applicant or the Proposed Premises do not qualify for a license under the Act. It further provides that the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4. Under section 23958.4(b)(1) and applying the criteria for over-concentration set forth therein, even if issuance of an on-sale Type-41 bona-fide eating place license would create or add to an undue concentration of licenses, the Department may still issue an off-sale license if it determines that public convenience or necessity would be served by issuance of the license.
4. In this instance, there was no reasonable evidence that issuance of the license would create a law enforcement problem.
5. The Department concluded that the applied for premises would serve “public convenience or necessity” and therefore issuance of the license was appropriate in this instance. (Finding of Fact 13) In that the premises is in a dense mixed-use area of San Francisco and there was no similar facility in the immediate area, that finding was reasonable under the circumstances.
6. Under section 23789(a) “The department is specifically authorized to refuse issuance, other than renewal or ownership transfer, of any retail license for premises located in the immediate vicinity of churches and hospitals.”
Under section 23789(b) “The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within at least 600 feet of schools and public playgrounds or non-profit youth facilities, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls. This distance shall be measured pursuant to rules of the department”.

⁸ *Coffin v. Alcoholic Beverage Control Appeals Board*, 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420, (2006).

7. There was neither any church nor hospital in the immediate vicinity of the applied for premises. There were neither public playgrounds nor non-profit youth facilities within 600 feet of Applicant's premises. The Tule Elk Park School was located approximately 590 feet from Applicant's premises. The Department notified the school of the application and it neither opposed nor protested issuance of the license. There was no indication that normal operation of the premises would unduly interfere with the school's operations.

8. California Code of Regulations, Title 4, Division 1, Article 11, section 61.4 (commonly referred to as Rule 61.4) provides that in cases involving an application for an original retail license or the premises-to-premises transfer of a retail license, no such license shall be issued if the premises or its parking lot is located within 100 feet of a residence. However, if the applicant establishes that operation of the business, if licensed, would not interfere with those residents' quiet enjoyment of their property, a license may be granted.

9. The evidence was clear that within the meaning of Rule 61.4, there were at least 40 residences within 100 feet of the applied for premises. Therefore, under Rule 61.4, the issue is whether "...the applicant establishes the operation of the business would not interfere with the quiet enjoyment of the property by residents."

10. To help prevent interference with the quiet enjoyment of Rule 61.4 residents, Applicant agreed to 15 conditions being added to the license if it was issued. (Finding of Fact 14) In part, these conditions included limiting the hours of availability of alcoholic beverages and banning alcoholic beverages for off-site consumption. The conditions also restricted use of the rear deck/patio to the hours of 8:00 a.m. to 9:00 p.m., Sunday through Wednesday and 8:00 a.m. to 10:00 p.m., Thursday through Saturday. They also required the licensee to monitor the front sidewalk patio area and rear patio area at all times alcoholic beverages are being served to ensure that the premises will operate in compliance with all laws and conditions. Applicant also indicated the rear deck's sound system has a pre-set volume limit on it to prevent it being played too loudly.

11. Protestant Byrne limited his protest to the licensing of the rear deck and lower patio area. He did not oppose licensing the main premises building or the small sidewalk patio adjacent to Union Street.

12. In this instance, despite the conditions Applicant agreed to, the use of alcoholic beverages on the rear deck and on the rear patio is likely to cause continuous and on-going residential disturbances to the nearby neighbors, including, but not limited to, the Protestant herein and at the adjacent Fong residence. The rear deck is open air and fully exposed to the back yards of those homes in the core of that block of homes. The deck and patio have an approximate capacity of 20 persons each. There is neither any wall nor vertical barrier nor roofing of any type that would dampen noise generated there. The sounds of the voices of patrons and

employees, operations, and activities on the deck and, to a lesser degree, the patio, cannot help but travel without obstruction into the rear yards and homes of nearby residents.

13. The Protestant has already experienced the noise that escapes the deck under the operation of Applicant herein. On at least three occasions, Protestant has called the police to register a complaint. Resident Fong has also experienced disturbances from the premises due to loud music, voices, and laughter coming from the deck or patio area. She has also been disturbed by the noise of those traveling up and down the rear steps and noises associated with the use of and preparation for use of the deck and patio.

14. The disturbances experienced by the Protestant and the Fongs with respect to Applicant's operations are in sharp contrast to virtually no disturbances experienced when the former licensee used the deck in a much more limited fashion. Applicant desires to use the deck and patio as a feature of its operations which it anticipates will be extremely popular on "fair-weather" days. While Applicant remains free to use the deck and lower patio in any lawful manner, its use should not include the sales, service, or consumption of alcoholic beverages.⁹

15. As stated in Conclusions of Law paragraph 2, an applicant bears the burden of proof at all stages of the application process. In a protest matter, a protestant has the burden of establishing by testimony and other competent evidence that the bases for the protest are legitimate. If the applicant is thereafter able to establish that a protest is without proper justification (such as, for example, that the concerns expressed are not related to the operation of the licensed business, or are "false, vexatious, frivolous, invalid or unreasonable, or without reasonable or probable cause" (see, Business and Professions Code section 24013: grounds upon which the Department may reject a protest prior to a hearing thereon)), or that it has taken adequate steps to mitigate the concerns of the protestant (which may include changes in business operations, agreement to the imposition of conditions, or physical changes to the premises—such as sound-proofing, installation of lighting, reconfiguration of entrances and exits or patron areas, etc.), then the Department may appropriately conclude that the applicant has met its burden in establishing that the applied-for license should issue notwithstanding the protest.

16. Applicant here argues that it has established non-interference with the neighbors by the inclusion of conditions limiting hours, monitoring the rear deck and patio areas, and prohibiting noise, together with a 6-foot wooden fence (with a 2-foot lattice), a full-grown tree, and another residence between the premises and the protestant's residence. However, these factors have failed to prevent interference with both Mr. Byrne's and Mrs. Fong's

⁹ Protestant and the Fongs also felt that since people on Applicant's rear deck can look into their back yard or the rear of their home that resulted in an invasion of their privacy. While that might be true, that issue is beyond the jurisdiction of the Department in the context of a protested application such as this. Conceivably, even under this decision, the Applicant could still serve patrons meals and non-alcoholic beverages on the deck.

quiet enjoyment of their residences. Moreover, Applicant did not present any evidence from other nearby residents to rebut the testimony of Mr. Byrne or Mrs. Fong.

17. While it may be that a “no noise audible” condition is sufficient to establish non-interference in an appropriate situation (either alone, or when coupled with other separation or non-interference factors), in a case such as this where the existing separation factors have failed to prevent, and continue to fail to prevent, interference with nearby residents, this condition is not adequate. Indeed, as the ALJ notes in his proposed decision (and cited by Applicant in its argument to the Department in support of its position), even without the service of alcoholic beverages in the rear deck and patio areas noise will continue to emanate from these areas during the normal operation of the business. Applicant’s argument thus appears to be that because nearby residents will be disturbed even without the issuance of a license, the Department cannot deny the application on the ground that Applicant has failed to establish non-interference. This is not a proper statement of the law, of the Department’s duties, or of an applicant’s burden. The Department is concerned with the issuance of a license to engage in a regulated business, and it must reasonably and appropriately balance the rights of nearby residents to not be disturbed with the interests of an applicant to sell alcoholic beverages.

18. Here, the evidence has established that the “no noise audible” condition, to which Applicant is subject under its Interim Operating Permit, is already being violated based upon the normal operation of the rear deck and patio areas. Issuing a license based upon a condition that the applicant has already shown it cannot comply with would not be reasonable or appropriate. There is no reasonable basis upon which the Department might conclude that Applicant will suddenly come into compliance once the permanent license is issued. Applicant has thus failed to meet its burden.

19. For the same reason, however, the Department should not impose a “no noise audible” condition encompassing an area of the licensed premises, such as, in this case, an open air sidewalk patio, in which it is inevitable that violations will occur. While this condition is typically used to mitigate issues related to noise emanating from a licensed business to the detriment of nearby residents, when it is applied to an open air patio on a sidewalk fronting a public street, it appears to be counter-productive. There is simply no way to expect that “noise” will not escape the sidewalk patio. When the ultimate objective is to restrict excessive noise arising from activities related to the service and consumption of alcoholic beverages, such as from entertainment or amplified music, more focused conditions may be appropriate. That would seem to be the situation here.

20. Applicant also asks the Department to completely disregard the testimony of Mrs. Fong since she did not file her own protest, despite having received proper notice of the application and the opportunity to file a protest. However, Applicant gives no legal basis for disregarding or striking the otherwise credible testimony of a non-protesting witness.

There is nothing inherently improper with a protestant calling non-protestant witnesses to testify as to their concerns, observations, or experiences. Indeed, there may be many reasons why an individual chooses not to, or is unable to, file a protest against the issuance of a license. The mere failure to file a protest is not grounds in and of itself to reject a witness' testimony, although it may be a relevant consideration and go to the weight to be given to such evidence.

ORDER

In his proposed decision the ALJ recommended adding a condition prohibiting the sales, service, and consumption of alcoholic beverages in the rear deck and patio areas of the licensed premises. However, this condition would create the somewhat anomalous and potentially confusing circumstance that these areas remain included within the area of the licensed premises, and thus subject to all of the conditions imposed on the license even though no alcoholic beverages are permitted. As a consequence, the Department hereby adopts the following as its Order in this case:

The protest of Brian Byrne is sustained.

The application of Naples SF, LLC is denied unless, within 30 days following the decision in this matter becoming final, the Applicant files with the Department a new premises diagram (ABC-257) excluding the rear deck and rear patio areas from the licensed premises, and concurrently executes a new Petition for Conditional License consistent with this decision and Order. In addition to the other conditions, the Petition for Conditional License shall replace the "no noise audible" condition with the following condition:

- Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated ____.

In addition, since there is no objection to the license being issued to the interior of the premises and sidewalk patio, until such time as this decision becomes final, if the Applicant wishes to exercise license privileges under an Interim Operating Permit in these areas, it may do so upon application and execution of a Petition for Conditional License including all of the conditions recommended by the ALJ in the proposed decision, with the exception of the "no noise audible" condition, which shall be replaced with the condition stated above.

Sacramento, California

Dated: November 3, 2017

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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.