

**Department of
Alcoholic Beverage Control**

INITIAL STATEMENT OF REASONS

PROPOSED ADOPTION OF REGULATIONS FOR
LICENSING OF PERMANENT NON-CONTIGUOUS AREAS

PROPOSED ADOPTIONS TO TITLE 4:

SECTION 70

PROBLEM STATEMENT AND PURPOSE

During the COVID-19 pandemic, the Department of Alcoholic Beverage Control (ABC) instituted a regulatory relief notice that licensees who could sell alcohol to consumers for consumption on their licensed premises could obtain a COVID-19 Temporary Catering Authorization (TCA). The TCAs allowed expansions of licensed premises to limit the spread of the virus while allowing licensees to remain open for business. These expansions were done without prior ABC investigation, but also could be revoked through complaints or objection by local law enforcement without a formal administrative hearing process. This led to licensees seeking a large amount of premises expansions in a short amount of time, some of them non-contiguous to the licensed premises.

Pursuant to AB 61 (Gabriel, Chapter 651, Statutes of 2021) and SB 314 (Wiener, Chapter 656, Statutes of 2021), the Legislature temporarily continued the TCA program by referring to the Fourth Notice of Regulatory Relief implemented by ABC within Business and Professions Code section 25750.5. Although it is within the department's existing authority to approve licensing of areas that are separate from the main licensed premises, ABC has not historically done so, as this often leads to control and enforcement issues. However, there are exceptions, such as in resort areas or when a premises is separated by a walkway or similar public thoroughfare, where ABC has issued some limited permanent non-contiguous expanded premises on a limited case-by-case basis while making sure each one was not a danger to the public health, safety, or welfare.

ABC has been very liberal with the issuance of TCAs during the COVID-19 state of emergency, deferring largely to the local authorities as to the propriety of alcohol service/consumption in such areas. However, ABC would not generally issue permanent licenses in many such areas that are currently temporarily licensed. Given the long-term operation under temporary regulatory relief, it is expected that many existing and future licensees will seek to incorporate such spaces into their licensed premises, with the support of their local government agencies. ABC anticipates that its traditional reticence at licensing such areas will be challenged. This regulation is intended to address many of the expected common concerns and to establish standards by which such areas may be responsibly permanently licensed and operated. Due to the large, anticipated influx of requests for permanent non-contiguous premises expansions, it is necessary for ABC to establish a standard policy for permanent non-contiguous

licensed premises away from the main previously licensed premises to protect the public health, safety, and welfare.

BENEFITS

The proposed regulation will institute a standard policy for ABC’s approval of permanent non-contiguous premises expansions. This standard policy will ensure that permanent non-contiguous premises expansions remain under control of the licensee, and do not become a danger to the public health, safety, or welfare. This standard policy will also streamline and inform local government agencies as to how ABC will review and enforce a licensee’s requested permanent non-contiguous expansion to ensure noncomplying TCAs are not approved to remain permanently and no costs to either the licensee, the local government, or ABC will be wasted on requests to make non-compliant TCAs permanent.

AUTHORITY

Authority: Section 25750.5, Business and Professions Code.

Reference: Section 23300, 23399, 24041, 24042.5, 24045.17, 25607, and 25750.5, Business and Professions Code; Section 65907, Government Code; and Section 114067, Health and Safety Code

NECESSITY

The specific purpose for each proposed section is as follows:

§ 70 (a)

The proposed subsection establishes the intent and focus of the proposed section as the parameters and policies for approving and enforcing uniform standards upon permanent non-contiguous licensed premises throughout the state. This subsection is necessary to establish that the rules and procedures apply to permanent non-contiguous licensed areas away from a licensee’s main licensed premises, but not to areas that are contiguous to the licensed premises or to currently operating TCA’s pursuant to Business and Professions Code section 25750.5.

§ 70 (b)

The proposed subsection establishes a definition of “non-contiguous area.” This subsection is necessary to put licensees on notice of the area(s) on their premises that must comply with the regulations set forth in this section.

§ 70 (c)

The proposed subsection establishes a definition of “open and operating” for purposes of this section to mean a licensee is preparing, participating, or cleaning up for the service of food or alcoholic beverages

on the licensed premises or non-contiguous area. This definition is necessary to ensure licensees, the public, local governments, and law enforcement know when various subparagraphs apply to a non-contiguous area seeking permanent licensure. It is anticipated that due to the way some non-contiguous areas are currently implemented the main licensed area may be open and operating while the non-contiguous area is not. The included definition is seeking to eliminate licensees from arguing that they were not currently open and operating due to a posted sign, or during their prep time, or after last call even though they continue to have patrons in the non-contiguous area.

§ 70 (d)

The proposed subsection and its subparagraphs provide the requirements for non-contiguous areas with which licensees must comply to be permanently licensed. This subsection is necessary to provide clarity to licensees such that they may appropriately keep and manage any permanently licensed non-contiguous area under their control. It also provides transparency to the public, local governments, and law enforcement of what standards ABC will use in the permanent licensing of non-contiguous areas to ensure the public's health and safety.

§ 70 (d) (1)

The proposed subparagraph requires the non-contiguous area be actively monitored at all times during which license privileges are being exercised in the non-contiguous area. This subsection is necessary to ensure licensees have knowledge of all activities occurring on a non-contiguous area during the hours in which the non-contiguous area is open and operating. Diligent management and observation will help prevent any licensed area from becoming a threat or danger to the public health, safety, or welfare. The dangers to public health, safety, and welfare are exacerbated in a non-contiguous area to a licensed premises because of the unlicensed area not in control of the licensee which separates portions of the licensed premises.

§ 70 (d) (1) (A)

The proposed subparagraph establishes a definition of "actively monitored." This subsection is necessary to provide guidance to licensees on the standards to comply with Title 4 California Code of Regulations § 70 (c) (1). Without this section there would be a lack of clarity to the meaning of "actively monitored" in the context of this sub paragraph. ABC chose this definition to ensure that licensees, their agents, or employees are aware of what is occurring in their non-contiguous area when licensed privileges are being exercised to ensure the area outside the licensee's control does not make the non-contiguous area a danger to the public health, safety, or welfare. Video surveillance is an important tool for actively monitoring an area, but often is used to determine the events after they happen, not when they happen. Relying solely on video surveillance would not provide a licensee or their agents with the real time information of a person assigned to watch the non-contiguous area that would satisfy ABC's intent of "actively monitoring" the area. In addition, since the licensee, their agents, or employees must traverse into the main area of the licensed premises to pour any alcoholic beverages ordered by a patron

in the non-contiguous area, and bring the alcoholic beverage through the unlicensed area pursuant to Title 4 California Code of Regulations § 70 (c) (8), the non-contiguous area should be visible and observable from the main licensed premises to ensure the “active monitoring” of the non-contiguous area can continue when the licensee, their agent or employees are within the main licensed premises. This requirement ensures that licensees, their agents, or their employees can readily “discern the appearance and conduct of all persons and patrons in the non-contiguous area.,” as required by this sub paragraph.

§ 70 (d) (2)

The proposed subparagraph prohibits the non-contiguous area from being separated from the main licensed area by a public roadway open to vehicular traffic during times that the non-contiguous area is open and operating. This subsection is necessary to prevent any patron or any employee of the licensee from crossing an active roadway while in possession of an alcoholic beverage. This will prevent any danger to public safety resulting from the interaction between open alcoholic beverages and roadways.

§ 70 (d) (3)

This subparagraph prevents patrons from leaving the licensed premises with an open container of any alcoholic beverage, even when traveling from the main licensed area to the non-contiguous area. It requires the licensee or an employee of the licensee to deliver all alcoholic beverages to the non-contiguous area from dispensing points within the main licensed area. This subsection is necessary to prevent patrons from violating California open-container laws by taking an alcoholic beverage away from an authorized licensed premises.

§ 70 (d) (4)

This subparagraph mandates that a licensee always exercise full control over the non-contiguous area when the licensed premises is open and operating in the non-contiguous area. This includes the right to prohibit any person from entering or remaining in the in the non-contiguous area. If a licensee is not able to control a portion of its licensed location, including who is present, who can obtain and imbibe alcoholic beverages, and deescalate any disturbances that may occur, that area of the licensed premises may become a threat or danger to the public health, safety, or welfare. This subsection is necessary to ensure the licensee can actively prevent the non-contiguous area from becoming a threat or danger to the public health, safety, or welfare prior to being permanently licensed.

§ 70 (d) (5)

This subsection requires the non-contiguous area be clearly delineated in a matter prescribed by ABC. This subsection is necessary to provide to the public and law enforcement notice of the scope of the licensed premises and the area in which the licensee may exercise license privileges. This is important for enforcement purposes and to ensure a licensee is responsible for the area licensed. This delineation is

a standard requirement for licensure usually accomplished with outer barriers to the licensed premises. However, since there are unlicensed areas between the main licensed premises and a non-contiguous area it becomes increasingly important to ensure patrons, the public, law enforcement, and ABC can see the delineations of which areas are licensed for the consumption of alcoholic beverages and which are not. Due to the varying nature of each individual licensed premises, and the needs of the local jurisdiction within which the license resides, the rules regarding these barriers will of necessity be delineated by the department on a case-by-case basis. Numerous factors are considered during the department's investigation, including but not limited to; the local zoning requirements, the locations of both the main licensed premises and the non-contiguous licensed premises, the nature of the areas between the licensed locations, whether the non-contiguous area is the only use, or if it can be only used during specific periods, adjacent licensed premises, adjacent buildings, and if there are nearby residences. Each of these factors can affect the need for different barriers or delineations between the licensed and unlicensed areas so that all involved can quickly understand where alcohol is allowed and where it is prohibited. This regulation cannot be made more specific for the type and nature of the barriers to be required, since it will be applied on a case-by-case basis, but there will be a need for some type of barrier or delineation in each instance of a non-contiguous licensed area.

§ 70 (d) (6)

This subsection allows licensees to share a common non-contiguous area only where they hold licenses authorizing the exact same privileges for on-sale consumption. To protect the public health, safety, and welfare, ABC has determined it is best to prohibit licensees with varied licensed privileges to participate in a shared space in non-contiguous areas due to their innate lack of security due to being next to unlicensed public spaces. The subsection also assigns to all licensees sharing a common non-contiguous area responsibility for all activities occurring in the common area. This subsection is necessary to provide guidance to licensees on the creation and management of shared non-contiguous areas and what types of shared spaces may be allowed in non-contiguous areas. It also encourages all licensees who participate in a shared space to actively monitor them to ensure the area does not become a threat or danger to the public health, safety, or welfare because all will be held responsible for violations that occur upon them. It is necessary to limit shared spaces to licensees who share the same privileges, because if they do not, the shared space would present violations if one licensee has expanded privileges. For example, if one licensee allows service of spirits or allows the presence of minors, but another licensee sharing the space is not allowed to have spirits consumed or minors present on its licensed premises it leads to violations for the licensee which has the lesser privileges. This creates an enforcement problem and puts licensees with varied privileges in shared spaces in adversarial positions. Due to ABC's liberal with the issuance of TCAs during the COVID-19 state of emergency without prior investigations, it is anticipated some TCAs currently operate with licensees sharing space with different licensed privileges and may be in violation of their main license. This subsection will require all permanently licensed non-contiguous areas to comply with having all licensees sharing non-contiguous areas to have the same privileges for on-premises consumption.

§ 70 (d) (7)

This subsection assigns to the licensee responsibility for all activities occurring on a non-contiguous area only during such times that the non-contiguous is open and operating if the area may be accessed by members of the public at times during which the licensed premises is not open. This subsection is necessary to establish the parameters of the licensee's administrative liability for activities occurring on their non-contiguous area when the licensee is not exercising licensed privileges in the non-contiguous area. It ensures the scope of the licensee's liability is not overbroad such that a violation of the ABC Act occurring in the non-contiguous area would not be held against the license if they were not exercising licensed privileges at the time the violation occurred. This results in fair outcomes for the licensee.

§ 70 (d) (8)

This subsection requires all sales of alcoholic beverages to be made from the main or primary area of the licensed premises. It prohibits the creation of any bar or other dispensing point to be used in the non-contiguous area for the purpose of selling or delivering alcoholic beverages to patrons. The subsection excludes from this prohibition the taking of alcoholic beverage orders for patrons seated in a non-contiguous area. This subsection is necessary to ensure the active monitoring of patrons purchasing and consuming alcoholic beverages within the established main licensed area. It ensures no dispensing points for alcohol exist in the less controlled non-contiguous area which reduces the likelihood of the area becoming a threat or danger to the public health, safety, or welfare.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENTS RELIED UPON.

Articles

There are no articles that pertain to these proposed regulations.

Department and Appeals Board Decisions

There are no Department precedential decisions or Appeals Board decisions that affect these regulations.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

ABC has determined that these regulations have a negligible economic impact upon ABC's budget. Any cost associated with these regulations will be absorbed in the Department's current budget.

ABC concludes that it is (1) unlikely that the proposal will eliminate any jobs, (2) unlikely that the proposal will create an unknown number of jobs, (3) unlikely that the proposal will create an unknown number of new businesses, (4) unlikely that the proposal will eliminate any existing businesses, and (5)

unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

ABC does anticipate the proposed regulations will facilitate some small business licensees continuing to maintain staff that would otherwise have been let go at the expiration of the TCA's due to not having a permanent non-contiguous premises expansion.

ABC has determined that the proposed regulation has a minimal effect upon the current health and welfare of California residents due to the permanent non-contiguous expansion of licensed premises because many of these permanent approvals are already currently in use. However, it will ensure the ongoing use of non-contiguous licensed premises will not cause any harm to the health, safety, or welfare of California residents and this protection will provide a benefit.

ABC has determined that with the proper delineation of non-contiguous licensed premises required by the proposed regulation, it will have no effect upon worker safety because the licensed areas will remain subject to the same rules as all current premises licensed for the consumption of alcoholic beverages.

ABC has determined this proposed regulation will have no effect upon the environment because it does not change a licensee's current duty to keep their licensed premises free of debris and trash that might harm the environment from activity on a permanently licensed non-contiguous premises.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Department has made the determination that the adoption of these regulations will have negligible economic impact on current and prospective licensees because there is no effect on current temporary use of non-contiguous licensed premises through the emergency COVID programs instituted by ABC and the legislature. The proposed regulation makes clear the standard used by which non-contiguous licensed premises must meet to become permanent after the temporary program has ended but is not a drastic change from policy currently in place. The proposed regulations will inform licensees, local governments, local law enforcement, and the public how ABC will determine if a temporary non-contiguous licensed premises can be made permanent, and how non-contiguous licensed premises must operate to remain free of harming the public health, safety, and welfare once their non-contiguous premises expansions are made a permanent part of the licensed premises.

Based on the above, the Department determined that the proposed regulatory action will not have a significant statewide adverse economic impact to businesses statewide including the ability of California businesses to compete with businesses in other states.

ALTERNATIVES CONSIDERED FOR THE IMPLEMENTATION OF EMERGENCY DECISIONS BY THE DEPARTMENT

There is no economic impact through the proposed regulatory package, and there are no alternatives considered for their implementation.

REGULATORY MANDATES

This regulatory package creates no new duties or regulatory mandates for licensees, local governments, or the Department.