

October 2022 Response to Comments

Licensing of Permanent Non-Contiguous Areas.

Patrons should be allowed to traverse unlicensed areas between licensed areas

Written Comments: 1, 5, 6, 10 – 97, 99, 101 – 105

Comments Summary:

Commenters request the proposed regulations be changed to allow patrons to carry alcoholic beverages from the main licensed premises to the non-contiguous licensed premises through unlicensed areas.

CA Dept of Alcoholic Beverage Control Response:

If prohibited by local law, the act of allowing a patron to leave the licensed premises and bring an open alcoholic beverage to an unlicensed area is a statutory violation of the Business and Professions Code. In addition, alcoholic beverages cannot be consumed in unlicensed areas. The Department does not have the regulatory authority to reverse years of legal precedent and statutory authority to allow this in local jurisdictions which prohibit it. If the patron leaves the licensed area and consumes the open alcoholic beverage while in the unlicensed area, both the patron and the licensee could be criminally and administratively cited. This is also true for the patron if they just remain in the unlicensed area when prohibited by local ordinance. This type of change would require a specific statutory exception and would require legislative action. However, the Department is aware of the varying needs of licensees and attempted to modify its regulations to make it easier on licensees to service a non-contiguous licensed area by other means such as by allowing a dispensing point within the non-contiguous area when prohibited by a local ordinance to allow patrons to traverse between the main area and the non-contiguous area of their licensed premises.

In addition, where traversing an unlicensed area is not prohibited, the Department has relaxed this prohibition and added additional rules to ensure non-contiguous areas remain safe. This change still does not allow licensee to allow any persons to consume alcoholic beverages in unlicensed areas or allow persons to remove an alcoholic beverage that is open from the licensed premises except for this minor exception for travel from one part of the licensed premises to the other. The Department has modified its proposed regulations in response to this comment.

Licenses need clarity on obligation and authority to enforce open container laws around their premises

Written Comment: 2

Comment Summary:

Commenter requests the proposed regulations clarify the licensee's obligation and authority to enforce open-container laws around non-contiguous permitted space.

CA Dept of Alcoholic Beverage Control Response:

An ABC licensee has the same obligation and authority to control and ensure the safety of those on all their licensed areas as they always have, regardless of the area being non-contiguous or not. This obligation and authority of the licensee includes ensuring no illegal activity occurs in or around their licensed premises. An ABC licensee has a statutory obligation to ensure their licensed premises is safe for the consumption of alcohol and that no illegal unlicensed consumption is happening adjacent to the licensed premises. Failure to meet this obligation can result in an administrative action brought by the Department. The Department did clarify this in its rules regarding traversal from one area of the licensed premises to another through unlicensed areas.

An exception for babies at the non-contiguous spaces for a bar

Written Comment: 2

Comment Summary:

Commenter requests the proposed regulations carve out an exception for the presence of babies in arms or in strollers in outdoor spaces for bar licenses.

CA Dept of Alcoholic Beverage Control Response:

The limit to all persons under 21 years of age being on a licensed public premises, including bar licenses, or type 48 licenses, is a statutory limitation imposed by the legislature. The Department does not have the authority to change statutory rules in a regulatory action. This comment requires no change to the proposed regulation.

In support of the proposed regulatory package.

Written Comments: 3, 100

Comments Summary:

Commenters are in support of the regulatory package in allowing permanent non-contiguous licensed premises expansions for after the temporary COVID permits expire and are no longer applicable.

CA Dept of Alcoholic Beverage Control Response:

This comment does not require a change to the proposed regulation.

Modify the proposed regulation to allow non-contiguous premises that cannot be seen from the main licensed premises.

Written Comments: 4, 5, 6, 10 – 72, 74 – 97, 101 – 105

Comments Summary:

Commenters request that the proposed regulations should be revised to allow a non-contiguous licensed area that is not visible and observable, without obstruction, from the interior of the primary or main area of the licensed premises, provided that additional safeguards are put in place to ensure that the non-contiguous licensed area is operated in a manner consistent with the health, safety, and welfare of the public.

CA Dept of Alcoholic Beverage Control Response:

The Department has modified the proposed regulations to allow these types of premises with additional public safety safeguards to ensure the health, safety, and welfare of the public.

Modify the proposed regulation to allow the placement of a portable dispensing point on a non-contiguous premises.

Written Comments: 4, 73

Comments Summary:

Commenters request that the provision prohibiting a non-contiguous licensed area bar, dispensing point, or other fixture or equipment of any kind, whether permanent or temporary, be removed.

CA Dept of Alcoholic Beverage Control Response:

The Department has modified the proposed regulations while ensuring the health, safety, and welfare of the public through additional safeguards if this type of fixture is used in a non-contiguous licensed area.

Modify the proposed regulation regarding the Department's imposition of a required barrier to delineate the licensed premises from non-licensed premises to ensure ABC does not require either a hard physical barrier, or any barrier that conflicts with local design guidelines, accessibility, or life safety requirements.

Written Comments: 5, 6, 84, 91, 92, 94, 97, 101 – 103

Comments Summary:

Commenters request that a modification to the language in the proposed section 70(d)(5) be modified in two ways; 1) ABC shall not prescribe the installation of hard physical barriers for the purpose of clear delineation of a non-contiguous area; and 2) ABC shall not require any barrier or delineation that would conflict with local design guidelines, accessibility, or life safety requirements.

CA Dept of Alcoholic Beverage Control Response:

The current proposed language of section 70(d)(5) states that a barrier delimitating the licensed premises from the unlicensed areas be erected so any person can readily discern the different areas. There is no mention of hard physical barriers, and as always, the Department will investigate and determine the appropriate barrier in each situation. If the space is temporary and only used during certain times, a permanent barrier would not be appropriate, but if it is always in use, it could be, especially to protect patrons from traffic if bordering a road for vehicular traffic. By prohibiting the Department from prescribing a physical barrier in all situations it would not allow the Department to protect the safety, health, and welfare of the public where appropriate. In addition, the Department is already required to comply with local government rules when issuing licenses in a jurisdiction, and there does not need to be an additional prohibition within the proposed regulations of things already statutorily prohibited. However, the Department made changes with this section to clarify that it cannot be used in universal ways and must be based upon the individual needs to each application.

Allow shared licensed areas for licenses with different privileges

Written Comments: 5, 6, 10 – 72, 74 – 97, 101 – 105

Comments Summary:

Commenters request that the prohibition of shared spaces for licensee with conflicting privileges be removed.

CA Dept of Alcoholic Beverage Control Response:

This provision was placed to protect ABC licensees from violations due to the confusion of patrons in a shared consumption area. If two licensees with varying privileges attempt to share a space under the law, the most restrictive rules for both licenses apply to that area.¹ The Department does not have the regulatory authority to change the statutory and legal precedent set as to how privileges in shared spaces work. In the example placed in some of the comments provided by commenters of when a bar, which doesn't allow persons under 21 on the premises, and a restaurant, which cannot serve distilled spirits, share a space, the shared space for both licenses cannot have distilled spirits on it, nor can it have persons under 21 on it. This creates confusion for patrons, and a high probability of violations for one or both licensees. The Department has found no way to limit this confusion other than to only allow shared spaces between licensees with the same privileges for the consumption of alcoholic beverages on their licensed premises, unless otherwise allowed by statute where the privileges have been delineated and not necessarily subject to the most restrictive standard referenced above. Commenters have also failed to provide any reasonable alternatives to alleviate the inherent confusion or high likelihood for violations within shared consumption spaces with differing privileges. The Department attempted to clarify this section to better inform the public, licensees, and Department staff that the privileges that must be the same apply to only alcoholic beverages being consumed on the licensed premises and not the same license type or privileges that do not apply to consumption on the premises.

¹ See *Pronto Market No. 1, Inc. v. Alcoholic Bev. Etc. Appeals Bd.* (1976) 61 Cal.App.3d 545 [132 Cal.Rptr. 236] for discussion of competing privileges over multiple licenses.

Change the definition of open and operating

Written Comments: 5, 6, 10 – 72, 74 – 97, 101 – 105

Comments Summary:

Commenters suggest revising the definition to clarify precisely when the business remains responsible for activity in the outdoor area because Section 70(d)(7) is not clear whether an outdoor area is “open and operating” if an employee is inside the business preparing for food service that will occur in the outdoor area once the business opens.

CA Dept of Alcoholic Beverage Control Response:

As it is currently proposed, the proposed regulation is more expansive than intended due to the large amount of preparation for service done in various licensed premises. This was intended to apply only to the non-contiguous space, but that is unclear in the current drafting of the definition. The proposed regulations have been changed to conform to the intent of the Department more closely and make more specific the definition of “open and operating” shifting for the different portions of a licensed premises when it is open for the service of patrons. This means the main licensed premises may be open and operating at times the non-contiguous area is not. However, since the non-contiguous area should be operating independently from the main licensed premises, the non-contiguous area should never be open and operating when the main licensed premises is not.

Do not make non-contiguous extended premises permanent

Written Comment: 7

Comment Summary:

Commenter suggests that the proposed regulatory package is not appropriate because the non-contiguous extended premises provide obstacles to the movement of pedestrians and motorists and tend to be visually unattractive—even ugly—with little or no consistency in size or appearance. They interfere with roadway safety and pedestrian mobility when they take up public space on sidewalks and streets for private gain.

CA Dept of Alcoholic Beverage Control Response:

The mobility of pedestrians, motorists, the attractiveness of the non-contiguous spaces, or the roadway safety are all outside the statutory purview of the Department. The Department cannot issue a license, or an expansion of the licensed footprint, unless the proposed licensed premises complies with local rules for zoning, operating a business, and safety of the public as established in each local area. The Department is statutorily bound by those local determinations and the concerns brought by this comment should be addressed to local government groups to ensure any future permanent expanded premises under the proposed regulation meet the desired safety standards of the commenters. This comment does not require a change to the proposed regulation.

Commenters suggest that the proposed regulatory action should not be implemented to better benefit restaurants and bars struggling due to the pandemic.

Written Comments: 8, 10 – 72, 74 – 83, 85 – 90, 93, 95, 96, 104, 105

Comments Summary:

Commenters claim the Department’s proposals would negatively impact restaurants and bars currently serving alcohol outdoors. Commenters state small businesses, bars, and restaurants need support as they are trying to recover from the Pandemic - not more regulation and obstacles. Commenters ask that rules and regulation relief that were put in place during the state of emergency continue to apply.

CA Dept of Alcoholic Beverage Control Response:

Pursuant to SB 314 and AB 61, which extended the Department’s regulatory relief, the Temporary Catering Authorizations will currently expire on either July 1, 2024, or a year after the state of emergency concludes, which is currently scheduled to end on February 28, 2023. Under current law all Temporary Catering Authorizations currently in use will end on February 28, 2024, with the exception that they may continue operating if the licensee has a pending application for the permanent expansion of their premises. This proposed regulatory action has no effect on any Temporary Catering Authorizations and is only laying the groundwork for a path for permanent licensure for some spaces that have existed through the state of emergency. Without the proposed regulatory action, there would be no process for any non-contiguous expanded premises currently in use under a Temporary COVID Authorization to be made permanent. This comment requires no change to the proposed regulation.

Commenters suggest that the proposed regulatory action should be amended to provide for more investigation of the expanded non-contiguous spaces and expanded footprints instituted under the Temporary COVID Authorizations.

Written Comments: 9, 98

Comments Summary:

Commenters request the process to permanently license non-contiguous spaces be evaluated on a case by case basis, take into account the impact upon the neighboring tenants or residences, require notification to those nearby persons that the space is being requested to be permanent, include physical inspections, allow protests of applications for permanent licensure, comply with local rules, take into account consideration points (such as schools, community centers, bus stops, parks, etc.), impose conditions if appropriate, and ensure due process for those effected by the permanent licensure.

CA Dept of Alcoholic Beverage Control Response:

The proposed regulation outlines the guidelines for approving the permanent licensure of non-contiguous licensed areas but does not change the process of getting a permanent approval of an expanded license footprint through the Department's existing licensing process. Due to the extreme distress of the emergency implementation of the Temporary COVID Authorizations, these investigations did not occur, specifically because they were temporary and just for the state of emergency. To seek permanent licensure of any non-contiguous licensed area and expand their licensed premises permanently, a licensee will be subject to all the Department's normal licensing rules, investigation, and notification requirements. The proposed regulatory action was modified to make the intent of the Department clearer that the proposed regulatory action does nothing to change the normal requirements and procedures for permanent licensure through application, notice, protest, and hearings if needed.

Commenter urges the Department to ensure the proposed regulation does not require additional staff to comply.

Written Comments: 10 – 72, 74 – 83, 85 – 90, 93, 95, 96, 104, 105

Comments Summary:

Commenter requests the Department not impose the proposed regulations, because section 70(d)(1), (3), (5), (6), and (7) require more staff and impose financial burdens upon licensees.

CA Dept of Alcoholic Beverage Control Response:

The Department is aware of the struggles of the hospitality industry still lingering due to the state of emergency during the pandemic. However, the Department does not require additional staff for licensees through any of the proposed regulations. If licensees are not able to exercise control over a requested non-contiguous space due to proximity, or lack of staff, then a non-contiguous area should not be permanently licensed. This comment requires no changes to the proposed regulation.

Individuals moving between adjacent or nearby non-contiguous spaces should be considered the liability of both licensees.

Written Comments: 98

Comments Summary:

Commenter requests the Department impose liability on licensees for consumers moving from one non-contiguous licensed premises to another adjacent or nearby non-contiguous space.

CA Dept of Alcoholic Beverage Control Response:

The Department is aware that people traditionally traverse between different licensed locations, however, this is not any different from going from one licensed location to another if it doesn't involve non-contiguous spaces. Since this issue is no different for non-contiguous areas, and normal licensed premises are outside the scope of this proposed regulation this comment should be addressed elsewhere. In addition, the Department only has regulatory authority over conduct of its licensees and the ABC Act, the Department is unable to create a new violation to hold its licensees to without defined statutory authority. This request to hold a licensee responsible for actions of patrons outside of its current licensed premises is most likely outside the Department's current statutory authority. This comment requires no change to the proposed regulation.

ABC should expand minor decoy operations to include if these spaces are truly actively monitored.

Written Comments: 98

Comments Summary:

Commenter requests the Department monitor licensees with non-contiguous licensed premises to see if they are “actively monitored” and controlling their licensed premises, including via minor decoy stings of bar and restaurant expanded footprints, including allowing minor decoys to seat themselves in non-contiguous bar areas.

CA Dept of Alcoholic Beverage Control Response:

This comment refers to the Department’s enforcement priorities and is outside the scope of the current regulation. As with all areas of the ABC Act and the accompanying regulatory actions, the Department will enforce and check upon licensees to ensure compliance with this framework once implemented. This comment requires no change to the proposed regulatory action.

Maximum occupancy in a non-contiguous space

Written Comments: 98

Comments Summary:

Commenter requests that the Department modify the regulatory package to impose conditions on non-contiguous areas regarding a maximum headcount within the non-contiguous space specifically, above and beyond any capacity limits already imposed.

CA Dept of Alcoholic Beverage Control Response:

The Department only has regulatory authority over conduct of its licensees and the ABC Act, the Department is unable to create a new violation to hold its licensees to without defined statutory authority. This request to set maximum occupancy limits as a condition of an alcoholic beverage license is outside the Department's current statutory authority. The Department is not equipped to judge the appropriate maximum person limit of a space. The authority and expertise to determine these standards is with the local zoning and governing bodies. The Department does require all licensees to comply with local safety requirements and that would not change if this was established by a local governing body. This comment requires no change to the proposed regulation.

Reserve the right to revoke non-contiguous spaces

Written Comments: 98

Comments Summary:

Commenter requests that the Department expressly reserve the power to broadly revoke non-contiguous space licenses from all licenses in areas where undue alcohol harm is occurring (similarly to its power to deny licenses in areas of undue concentration). The trigger criteria for this revocation should be clearly stated, and available for the public.

CA Dept of Alcoholic Beverage Control Response:

The proposed regulation has no effect upon violation enforcement for licensees. The Department cannot specifically revoke a portion of the licensed premises once it is permanently licensed without due process of law. The Department anticipates using its current enforcement structure to ensure all licensed areas comply with this and all obligations under the ABC Act. This comment is outside the scope of the proposed regulation. This comment requires no change to the proposed regulation.

Outdoor non-contiguous spaces considered outdoor spaces for advertising

Written Comments: 98

Comments Summary:

Commenter requests that the Department classify the structures within these non-contiguous spaces should be considered outdoor space for purposes of enforcing advertising and marketing restrictions.

CA Dept of Alcoholic Beverage Control Response:

The proposed regulations do not change any of the rules for outdoor advertising, and all those rules remain in place for all non-contiguous spaces that may be made permanent parts of the licensed premises. This comment is outside the scope of the proposed regulation. This comment requires no change to the proposed regulation.

Evaluate local government-imposed licensing criteria for permanent licensure of non-contiguous areas

Written Comments: 98

Comments Summary:

Commenter requests that the Department evaluate licensing criteria imposed by local governing bodies to all non-contiguous areas in their jurisdiction, and license-specific conditions imposed on the initial granting of the license, to ensure that Department's imposed conditions are as restrictive or more restrictive than those already in place.

CA Dept of Alcoholic Beverage Control Response:

The Department considers conditions on a case-by-case basis for all licensing investigations, and that will not change for investigations into non-contiguous licensed premises expansions. The Department has the statutory authority to create and enforce statewide rules that apply to licensees throughout the state to protect the public health, safety, and welfare. Licensees are required to comply with all applicable laws and standards set by both their local government and the Department. The Department's statewide rules do not preempt local rules if they are more restrictive, and the Department should not base its statewide guidelines and standards on those set by any local government for their own jurisdictions that may be more restrictive than the Department's statewide rules. This comment does not require a change to the proposed regulation.

Late Comments

Written Comments: 103-105

Comments Summary:

Commenters provided written comments after the 45-day written comment period has expired as of 5:00 pm on November 1, 2020, set by the Department in the notice of regulatory action published on September 16, 2022.

CA Dept of Alcoholic Beverage Control Response:

Although these comments were received outside the statutory required written comment period for inclusion in the regulatory record, they each included issues that had already been raised by timely commenters and have been sorted as such in the Department's written responses.