

**State of California
Office of Administrative Law**

In re:
**Department of Alcoholic Beverage
Control**

Regulatory Action:

Title 04, California Code of Regulations

Adopt sections: 70

Amend sections:

Repeal sections:

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2023-0606-01

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

In this rulemaking action, the Department of Alcoholic Beverage Control (Department) proposes to adopt a regulation to establish requirements for permanent licenses that would allow the on-sale consumption of alcoholic beverages in non-contiguous areas.

On June 6, 2023, the Department submitted the above-referenced rulemaking action to the Office of Administrative Law (OAL) for review. On July 19, 2023, OAL notified the Department that OAL disapproved the proposed action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action because the proposed regulatory changes failed to comply with the clarity standard of Government Code section 11349.1, subdivision (a)(3), and with required APA procedures.

DISCUSSION

The Department's action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted,

amended, or repealed by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.)

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and for compliance with the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the standards a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency with regard to the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. CLARITY STANDARD

In adopting the APA, the Legislature found the language of many regulations to be unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "written or displayed so that the meaning of the regulations will be easily understood by those persons directly affected by them."

The "clarity" standard is further defined in section 16, title 1, of the California Code of Regulations (CCR), OAL's regulation on "clarity," which provides:

In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:

- (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
- (2) the language of the regulation conflicts with the agency's description of the effect of the regulation; or
- (3) the regulation uses terms which do not have meanings generally familiar to those "directly affected" by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or

(4) [...]

(5) [...]

(6) [...]

(b) Persons shall be presumed to be “directly affected” if they:

(1) are legally required to comply with the regulation; or

(2) are legally required to enforce the regulation; or

(3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or

(4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

The following provisions in the Department's proposed action do not satisfy the clarity standard.

1.1. Scope of the proposed regulation

In its Notice of Proposed Action, the Department described the intended effects of the proposed regulation. The Notice states:

The proposed regulations seek to formally implement standards [the Department] has used on a case-by-case basis for the approval of non-contiguous licensed premises. The regulatory package was created in response to the influx of non-contiguous [Temporary Catering Authorization (TCA)] requested pursuant to the Fourth Notice of Regulatory Relief instituted by [the Department] in response to the COVID-19 state of emergency, and the Legislature's subsequent codification of the program in Business and Professions Code section 25050.5 (sic)¹. [The Department] anticipates many licensees will seek to make TCA's permanent prior to when they expire pursuant to Business and Professions Code section 25050.5 (sic). The regulatory package will notify the public, [the Department's] licensees, local governments, and local law enforcement agencies of the standards that [the Department] will apply when approving permanent non-contiguous licensed areas for continued use by licensees, and how those permanent non-contiguous licensed areas must operate after their approval.

The Notice indicates that under proposed section 70, title 4 of the CCR, permanent licenses will be issued to businesses that have held “non-contiguous TCAs,” approved in accordance with the Fourth Notice of Regulatory Relief,

¹ The correct citation is Business and Professions Code section 25750.5.

pursuant to Business and Professions Code section 25750.5, which states, in relevant part:

The department may extend the period of time during which the COVID-19 Temporary Catering Authorization is valid beyond 365 days if the licensee has **filed a pending application with the department for the permanent expansion of their premises** before the 365-day time period expires. [Emphasis added.]

While this statute allows the Department to extend the duration of a TCA, it does not prohibit the Department from issuing permanent licenses to non-TCA-holding licensees. Thus, the regulation must be clear as to who can apply for the permanent license. (Gov. Code, sec. 11349, subd. (c).)

The language of the proposed regulation does not limit permanent licenses to businesses that have held non-contiguous TCAs. The regulation could be interpreted to allow businesses that do not have non-contiguous TCAs to apply for a permanent license for a non-contiguous area. Proposed section 70(a) states:

70. (a) The intent of this regulation is to **establish parameters for the permanent licensing of additional areas** that are in reasonable proximity to, but not contiguous to, and not operating independently from, a primary licensed premises within which alcoholic beverage are served for consumption on the premises. [Emphasis added.]

Nowhere in the proposed regulation is there a limitation as to which business can apply for a permanent license for a non-contiguous area.

Additionally, the Initial Statement of Reasons (ISOR) provides the following statement of necessity for proposed section 70(a): "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."

While the Notice indicates that the permanent licenses will only be issued to businesses who have held non-contiguous TCAs, the ISOR seems to allow businesses that do not already hold TCAs to be issued the permanent license. The proposed regulation is worded such that it could be interpreted to allow either business to apply for the permanent license. Thus, the proposed regulation is unclear because the language of the regulation conflicts with the agency's

description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

Further, it is unclear whether the permanent licensing of “additional areas” implies that the business will be required to apply for a new license or modify its existing license. And it is unclear whether the business will be required to pay an application fee and what the fee amount would be. Thus, the directed public would not know the application requirements and procedures with which it must comply. For these reasons, the proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).)

1.2. Definition of “non-contiguous area”

Proposed section 70 defines the term “non-contiguous area” as follows:

70. (a) The intent of this regulation is to establish parameters for the permanent licensing of **additional areas that are in reasonable proximity** to, but not contiguous to, and not operating independently from, a primary licensed premises within which alcoholic beverage are served for consumption on the premises.

(b) For purposes of this section, “non-contiguous area” means an area of the licensed premises that is **adjunct to, separated from**, the main or primary area of the licensed premises in such a way that alcoholic beverage sold in the licensed premises must pass through an unlicensed area for delivery or consumption to a separate licensed area under a single alcoholic beverage license.

[Emphasis added.]

The term “reasonable proximity” is vague, such that the affected public would not know whether the area is close enough or too far from the main licensed premises. The term “reasonable proximity” could mean 20 feet away or 100 feet away. The proposed regulation is unclear because it can, on its face, be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).)

1.3. Definition of “open and operating”

Proposed section 70(c) states:

70. (c) For purposes of this section, “open and operating” means all times during which an area of the licensed premises is open to patrons for the purpose of receiving services from

the licensed business. This definition is not limited by any operating hours advertised by the licensee and **will be liberally applied** when enforced. A non-contiguous area is **not necessarily open and operating** during all times the main licensed premises is open and operating.

As pointed out in the public comments included in the rulemaking record, "[g]iven the regulation's stated direction to be 'liberally applied,' it is critical that this provision be redrafted to make clear precisely when a business will be responsible for activity in the outdoor area."

It is not clear what "liberally applied" means or what effect the liberal application will have on the determination of whether an area is open and operating. And the subsequent sentence, which states that a non-contiguous area is "not necessarily open and operating" at the same time as the main licensed premises, does not clarify when a business will be responsible for activity in the non-contiguous area. As currently worded, the non-contiguous area could still be open and operating even if the main licensed premises is not. However, the ISOR states that this proposed provision "is seeking to eliminate licensees from asserting 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." Thus, the proposed regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).) Additionally, the proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).)

1.4. Actively monitoring the non-contiguous areas

Proposed sections 70(d)(1) and (d)(8) state:

70. (d) The following shall apply to any permanently licensed non-contiguous area:

[...]

(1) The non-contiguous area must be actively monitored at all times in such a manner to **readily discern the appearance and conduct of all persons** in the non-contiguous area of the licensed premises while it is open and operating.

A. For purposes of this provision, "actively monitored" means any of the following:

i. that the licensee, or an employee or agent of the licensee, shall always be able to observe the non-contiguous licensed area from the interior of the primary or main area of the licensed premises,

- ii. that the licensee, or an employee or agent of the licensee, shall be present within the non-contiguous area at all times the non-contiguous area is open and operating, or
- iii. the licensee maintains **regular and consistent bona fide service** within the non-contiguous area while it is open and operating.

B. Active monitoring may include the use of electronic video surveillance, except it shall not be the exclusive method of observation...

[...]

(8) If an **approved bar or dispensing point** is located within the non-contiguous area, it **shall be always staffed** by the licensee when unsecured alcoholic beverages are present. For purposed (sic) of this section, **"unsecured alcoholic beverage" means any alcoholic beverage container**, even if manufacturer sealed, that is **unattended by the licensee** or a patron, and not secured within a locked fixture. The fixture referenced in this subsection does not need to be permanently affixed within the non-contiguous area.

[Emphasis added.]

To explain the rationale for the proposed language, the rulemaking record states that readily discerning the appearance and conduct of all persons "ensures that licensees maintain awareness of all activities occurring on a non-contiguous area during the hours in which the non-contiguous area is open and operating."

However, the requirement to simply maintain "regular and consistent bona fide service" does not equate to active monitoring within the Department's intended meaning. Thus, the proposed regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

It is also unclear what a licensee must do to maintain regular and consistent bona fide service in the non-contiguous area. As currently worded, the phrase could refer to simply serving alcohol in the area, or it could require more from the licensee. Nevertheless, the licensee would not know whether their service is sufficient to comply with the regulation. The proposed regulation is unclear because it can, on its face, be reasonably and logically interpreted to have more than one meaning. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(1).)

Moreover, given proposed section 70(d)(8) requires the area to **always** be staffed when an alcoholic beverage is unattended, the proposed regulation appears to be internally inconsistent. One provision allows mere "regular and

consistent bona fide service," while another provision requires the area to always be staffed. First, the licensee must be able to determine when the Department deems an alcoholic beverage "unattended." And second, the regulation must clearly state what the licensee is required to do when an alcoholic beverage is unattended in the non-contiguous area. As currently written, the proposed regulation leaves these questions unanswered.

For these reasons, the proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).)

1.5. Delineating non-contiguous areas

Proposed section 70(d)(5) reads:

70. (d) The following shall apply to any permanently licensed non-contiguous area:

(1)[...]

(5) The non-contiguous area shall be ***clearly delineated in a manner approved by the department in connection with a specific application such that any person may be readily able to discern the non-contiguous area*** within which alcoholic beverages may be served or consumed. Signs shall be posted to remind patrons that they cannot consume alcoholic beverages in unlicensed areas, including between the main licensed premises and any non-contiguous licensed area.

A. The signs required (sic) the above subsection shall be conspicuously posted at all entrances and exits of both the main licensed area and the non-contiguous area shall be written in no smaller than size 36 font and shall measure at least five inches wide and five inches tall.

[Emphasis added.]

In order to comply with this provision, the business licensee must know which manner of delineation is approved by the Department for the delineation to be clear. As currently worded, the proposed regulation does not provide any criteria or factors considered by the Department in evaluating whether the delineation is clear.

To explain the rationale for the proposed language, the Final Statement of Reasons reads: "[d]ue 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 ABC on a case-by-case basis." The document then goes on with a list of factors the Department considers when approving the delineation of a non-contiguous

area. While the Final Statement of Reasons provides some guidance as to what factors or criteria are taken into consideration in the Department's decision, the proposed regulation vaguely allows any factors or criteria to be considered. Thus, the proposed regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

1.6. Additional conditions

Proposed section 70(f) states:

70. (f) Nothing in this section restricts or precludes the imposition of additional conditions for the operation of a licensed non-contiguous area as **may be required by the department for specific licensed premises**. Conditions may be placed solely upon the non-contiguous space, or upon the entire licensed premises as determined by the needs of each application.
[Emphasis added.]

It is unclear what additional conditions **may** be imposed, what these additional conditions **may** be, and how the licensee **may** find out conditions were added for their licensed premises. Further, the proposed regulation does not specify which standards the Department would apply in deciding to impose additional conditions. Thus, the proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).)

1.7. Proximity of non-contiguous areas to the main licensed area

Proposed section 70(g) states:

70. (a) The intent of this regulation is to establish parameters for the permanent licensing of **additional areas that are in reasonable proximity to**, but not contiguous to, and not **operating independently from**, a primary licensed premises within which alcoholic beverage are served for consumption on the premises.

[...]

(g) The non-contiguous area shall be **reasonably close** to the main licensed area and shall not function as an independent licensed area while open and operating. If the non-contiguous area **functions independently when open and operating**, it should be licensed as appropriate under a separate license.
[Emphasis added.]

As discussed above, the term “reasonable proximity” is vague, such that the directly affected public would not know whether the area is close enough or too far from the main licensed premises. The term “reasonably close” is similarly vague.

Moreover, it is unclear when an additional area is deemed to be “operating independently” or “functions independently” from the main licensed premises. This overbroad verbiage makes the proposed regulation unclear as to when an area is deemed independent and would require a separate license. For these reasons, the proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).)

1.8. Posting of notice for the public

Proposed section 70(h) states:

70. (h) **Notice** required to the public by law shall be measured **from the absolute boundaries** of both the main licensed area and the non-contiguous area. This includes any areas where either employees or patrons may be present with alcoholic beverages that may be unlicensed.
[Emphasis added.]

It is unclear what an absolute boundary is, how it is determined, and whether it is the licensee, the Department, a local jurisdiction, or some other entity that determines the boundary and measures from it. The proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).)

Further, as currently worded, the proposed regulation appears to require the notice to be measured. However, the rulemaking record indicates that it is the scope of the area that is measured to determine which residents must be noticed as required by law. As written, the proposed regulation is not easily understood by those directly affected by it. (Gov. Code, sec. 11349, subd. (c).) Prior to the resubmittal of this rulemaking action to OAL for review, this provision must be revised to reflect the Department’s intent.

1.9. Requirement of the main licensed area

Proposed section 70(j) states:

670. (j) The main licensed area shall at all times, independently of activities being conducted in the non-contiguous area, be

maintained ***such that it satisfies all requirements for the exercising of privileges under the license.***

[Emphasis added.]

To explain the rationale for the proposed language, the Final Statement of Reasons states that a “non-contiguous licensed area approved by this section was intended to focus on additional space, not to meet an essential required element of the main premises.”

However, the proposed regulation appears to allow activities that do not comply with license requirements to occur in the non-contiguous areas. In other words, so long as the main licensed premises complies with the license requirements, non-compliant activities in the non-contiguous areas would not affect the license of the main licensed area. Thus, the proposed regulation is unclear because the language of the regulation conflicts with the agency's description of the effect of the regulation. (Cal. Code Regs., tit. 1, sec. 16, subd. (a)(2).)

2. FAILURE TO FOLLOW REQUIRED APA PROCEDURES

The APA and OAL's regulations in title 1 of the CCR require agencies to follow specific procedures when conducting a regulatory action. In this action, the Department did not comply with the following procedures.

2.1 Necessity

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all regulations for compliance with the necessity standard. Government Code section 11349, subdivision (a), defines “necessity” to mean:

(a) ...the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To further explain the meaning of substantial evidence in the context of the necessity standard, title 1 of the CCR, section 10, subdivision (b), provides:

(b) In order to meet the “necessity” standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) A statement of the specific purpose of **each** adoption, amendment, or repeal; and
- (2) information explaining why **each provision** of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.
[Emphasis added.]

The Department modified the proposed regulation and noticed the public with the modifications. However, the record does not include the necessity statements for each modified provision proposed to be adopted. The Department must follow the APA procedures and provide necessity in the rulemaking record for each modified provision proposed to be adopted.

2.2 Authority and Reference Citations

State agencies are required to comply with the authority and reference standards of the APA. (Gov. Code, sec. 11349.1, subd. (a).) Authority is presumed to exist only if an agency cites in its "authority" note proposed for printing, a California constitutional or statutory provision that authorizes an agency to adopt, amend, or repeal the regulation. (Cal. Code Regs., tit. 1, sec. 14, subd. (a).)

The proposed regulation must include authority and reference citations. (Cal. Code Regs., tit. 1, sec. 8, subd. (a)(1).) However, the authority cited, Business and Professions Code section 25750.5, is not one that authorizes the Department to adopt the proposed regulation. Instead, it only allows the Department to extend TCAs if a licensee filed a pending application for a permanent expansion of the licensed premises. Additional authority citations must be provided to address the authority to adopt a regulation for permanent licenses of non-contiguous areas. The Department must revise its authority and reference citations to comply with the above-mentioned APA requirements.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), the

Department may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to the Department on the date indicated below.

The Department must make any substantive regulatory text changes necessary to address the deficiencies discussed above, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision (c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any objections or recommendations raised by the public during the 15-day public comment period must be summarized and responded to in the Final Statement of Reasons. The Department must resolve all issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action. OAL reserves the right to review the Department's resubmitted regulations and rulemaking record for compliance with all substantive and procedural requirements of the APA.

If you have any questions, please do not hesitate to contact me at (916) 323-6824.



Date: July 26, 2023

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