BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9539
File: 41-544462 Reg: 15081938

JOHN P. COLTON and RAFI SARKIS,
Appellants/Protestants

v.

BRIDALFACE, LLC
dba Birba
458 Grove Street, San Francisco CA 94102-4303
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 7, 2016
Sacramento, CA

ISSUED MAY 2, 2016

Appearances: *Appellants/Protestants:* John P. Colton and Rafi Sarkis, in propria persona.
Respondents: Melani Johns, of Strike & Techel, as counsel for applicant/respondent Bridalface LLC; Heather Hoganson as counsel for the Department of Alcoholic Beverage Control.

OPINION

John P. Colton and Rafi Sarkis (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control[1] granting the application of Bridalface, LLC, doing business as Birba, for an on-sale beer and wine public eating place license.

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated August 12, 2015, is set forth in the appendix.

At the administrative hearing held on May 13, 2015, documentary evidence was received and testimony concerning the violation charged was presented by Riselwyn Melodias, a licensing representative for the Department; by Angela Valgiusti, respondent's sole owner; and by appellant/protestant John P. Colton.

Testimony established that on or about September 29, respondent executed a Petition for Conditional License, in which respondent stipulated that (1) the premises is located in a census tract where there presently exists an undue concentration of licenses as defined by section 23958.4; (2) that by reason for the overconcentration of licenses, grounds exist for denial of the license; (3) the privilege conveyed with the type 31 license requires respondent to operate the premises in good faith as a bona fide public eating place; (4) the premises is located within 600 feet of two consideration points, and issuance of an unrestricted license without conditions may interfere with these consideration points; (5) the premises is located within 100 feet of residences, and issuance of the license without conditions would interfere with with the quiet enjoyment of nearby residents' property and constitutes grounds for denial of the application under rule 61.4 (see Cal. Code Regs., tit. 4, § 61.4); (6) protests have been filed against the issuance of the license and the protests deal with the proposed operation of the premises; (7) the San Francisco Police Department protested the unconditional issuance of the license as issuance would tend to aggravate an existing law enforcement problem, but withdrew its protest based on the imposition of conditions contained in the Petition for Conditional License; and (8) the issuance of an unrestricted license would be contrary to public welfare and morals.

In recognition of these stipulations, respondent agreed to the imposition of two operating restrictions on the license:

1 Noise shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 04/22/2014.

2 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 control of the licensee(s) as depicted on the AB-257 dated 04/22/2014.

(Exh. 2.)

On March 25, 2015, the Department issued respondent Bridalface, LLC, doing business as Birba, an interim operating permit (IOP) pursuant to Business and Professions Code section 24044.5. The IOP authorizes respondent to sell alcoholic beverages with a temporary license. Respondent has been selling alcoholic beverages since the issuance of the IOP. The Department has found no cause to discipline respondent since it began exercising privileges under the IOP.

Respondent's licensed premises is situated in a mixed residential/commercial area of San Francisco called Hayes Valley. The premises is located on the bottom floor of a two-story building, with an adjacent hair salon occupying the other ground floor space. The premises is quite small, measuring 575 square feet total. The interior is comprised of stool seating at small tables and a wood counter attached to the walls. There is an outside patio comprising an additional 700 square feet, but respondent has agreed not to use the back patio for any reason. The space respondent is occupying has never been licensed by the Department.

The upstairs portion of respondent's building is occupied by a travel agency. The travel agency employs twelve people. There is a staircase from the travel agency onto the back patio, which the employees transit to sit on the patio. Respondent has requested that the employees of the travel agency not use the staircase and patio, but they have not complied with respondent's request.

The appellants — protestants below — are married and live in an apartment adjacent to the aforementioned back patio. Their residence is within 100 feet of the licensed premises, and portions of their apartment overlook the back patio.

Respondent intends its business to be a neighborhood restaurant and wine bar. Respondent envisions neighborhood families, young professionals, and theatre-goers frequenting its premises.

The premises will be open for lunch from noon to 3:00 p.m., Tuesday through Friday. The current lunch/daytime menu consists of sandwiches, salads, soups, and desserts. Each of these dishes is paired with recommended wine choices. Valgiusti, respondent's owner, has an extensive background in wine, most recently working as a sommelier at the Slanted Door restaurant in the Ferry Building in San Francisco.

Dinner is served from 5:00 p.m. to 10:00 p.m., Tuesday through Friday. The evening dinner menu features heartier fare, consisting of empanadas, hot meatballs, and tapas-style dishes. These offerings are also paired with recommended wine choices, primarily from Spain, Italy, and France.

The licensed premises is open on Saturdays from 3:00 p.m. to 10:00 p.m., and on Sundays from 3:00 p.m. to 9:00 p.m. Alcoholic beverage service ends at 10:00 p.m. and 9:00 p.m. respectively. The restaurant is not open on Mondays.

All food is prepared on premises in the kitchen. The kitchen has a convection oven, two induction burners, refrigerators for food and wine, a Cuisinart, slicer, and a three- compartment sink. In addition, there are assorted cooking utensils and knives. Food is served on plates, bowls, and in "casuelas," which are ceramic vessels for polenta, meatballs, and vegetables.

Respondent's menu changes according to local products being seasonally

available. Respondent submitted a menu to the Department during the application process that indicates a wide variety of dishes including cheese and charcuterie, vegetables, seafood, meats, soups, and flatbread.

Food is always offered with wine selections, thus making wine service incidental to food service. The Department investigated whether respondent satisfied the requirements of type 41 licensure and found that respondent fulfilled the requisites of a bona fide public eating place. Respondent acknowledged it is required to function as a bona fide public eating place pursuant to the Petition for Conditional License.

The premises is properly zoned for its intended use. The restaurant underwent an extensive "discretionary review" by the San Francisco Planning Department in September 2014. This review commenced after local neighbors expressed concern about noise and disturbances from patrons using the outside back patio. The Planning Department determined a Conditional Use Authorization (CUA) was required if the outside back patio was to remain a part of the planned operation of the premises. However, respondent, as previously noted, agreed not to use the outside patio, and executed a "Patio Acknowledgment" form for the Department. Following respondent's decision not to operate the outdoor back patio, the San Francisco Planning Department recommended approval of the restaurant operation.

Appellants contended that issuance of the license with conditions would nevertheless create a public nuisance and negatively affect the quiet enjoyment of their nearby apartment.

Department licensing representative Melodias investigated respodent's application and the associated protests. Melodias identified sixty-three residences within 100 feet of the premises. The Department received four valid, verified protests.

All of the initial protestants lived within 100 feet of the premises. Respondent also received letters of support from a nearby resident and a resident within 100 feet.

Respondent has expended considerable funds to soundproof the licensed premises. The expenditure was designed to mitigate potential noise disturbances emanating from the premises.

In April 2015, appellants filed three complaints with the Department concerning noise radiating from the licensed premises. The complaints ranged from patron noise level to music emanating from speakers on the back patio. On one occasion, the back door of the premises was left open.

Respondent has posted a sign requesting patrons refrain from opening the back door. Appellants did not contact Valgiusti about the noise on any of the occasions they filed complaints. Appellant Colton testified he has never "reached out" to Valgiusti about his noise complaints.

On May 7, 2015, the Department dispatched enforcement agents to visit the premises to investigate noise issues and potential ABC violations raised by appellants' complaints. The agents reported there were no ABC violations and that sound from the premises was minimal. Additionally, respondent made a sound recording of patron noise from outside the premises on a very busy night.

Valgiusti testified that external speakers on the patio are connected to a sound system inside the restaurant, and were installed by a prior occupant of the premises. Respondent does not intend to use the sound system, but testified that on one occasion someone accidentally turned on the sound system, including the outside speakers. This was a mistake that has not been repeated. The back door is opened after business hours to take the trash out on certain nights of the week. On very rare

occasions, the back door and a back window are opened when it is very hot. However, if the restaurant gets too noisy then the windows and door are shut.

Valgiusti testified that patrons have never lined up along the street to enter the premises, and that when patrons indicate they are going outside to smoke, she asks them to move down the sidewalk. Appellants presented no evidence of people lining up to enter the premises or of cars or delivery trucks blocking their driveway.

Licensing Representative Melodias concluded that operation of the licensed premises would not interfere with the quiet enjoyment of nearby neighbors' property.

After the hearing, the Department issued its decision, which determined,

> Bridalface LLC's business model, current clientele, and Ms. Valgiusti's responsible approach to operating Birba provides substantial evidence the nearby resident's [*sic*] quiet enjoyment of their property will be adequately safeguarded. Ms. Valgiusti has already made major concessions to this end by foregoing a major component of her business plan; the outdoor, back patio will not be used. This was the primary concern of nearby residents and the current Protestants.

(Findings of Fact, ¶ 13; see also Determination of Issues, ¶ 3.) Additionally, the Department held that although there was indeed an overconcentration of licenses in the census tract, respondent satisfied public convenience or necessity pursuant to Business and Professions Code section 23958.4(b)(1) based on its "unique offering of food(s) not offered in the immediate area, and also the selection of wines from around the world to complement the menu." (Findings of Fact, ¶ 17; see also Determination of Issues, ¶ 5.)

Appellants have filed an appeal making the following contentions: (1) Respondent's premises is too small to operate as a bona fide eating place under the San Francisco Planning Code; (2) the Department did not conduct a thorough investigation; (3) respondent improperly altered the premises diagram after the notice

period, depriving appellants of the opportunity to argue against the modified diagram and operation of the licensed premises without the patio; (4) the finding that respondent agreed to forego use of the patio in order to protect residents' quiet enjoyment is not supported by the evidence, which instead suggests respondent signed the Patio Acknowledgment in order to expedite approval from the city; (5) the license condition addressing audible noise is insufficient to protect residents' quiet enjoyment; (6) the finding that respondent's soundproofing has been effective is not supported by the evidence, which shows that noise is audible outside the premises when the rear door or windows are open; (7) the ALJ improperly considered appellants' failure to directly contact respondent about noise issues, which is irrelevant to the question of whether noise is in fact audible outside the premises; (8) the Department has failed to enforce the noise condition on respondent's conditional license; (9) the Department's audible noise standard is vague and arbitrary; and (10) findings regarding the level of noise on a busy night, based on respondent's videorecording, are misleading because the door was closed and one window was only slightly open, which does not accurately portray the circumstances under which noise becomes audible outside the premises.

DISCUSSION

I

Appellants note that the licensed premises is a very small space with limited seating, and contend that "[g]iven the current layout of the space, the limited seating, single table, and limited kitchen . . . [respondent] will have great difficulty operating as a restaurant and will quite easily devolve into nothing more than a bar with limited food service." (App.Br. at p. 4.) Appellants argue this will put respondent in violation of section 790.142 of the San Francisco Planning Code. According to that section, in

order to qualify as a "bona fide public eating place," at least fifty-one percent of a restaurant's gross sales must be from food sales prepared and sold on the premises.

We review an appeal using the substantial evidence rule and are bound by the Department's factual findings absent an abuse of discretion:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].) On appeal, the burden lies with appellants to show that substantial evidence does not exist:

> The substantial evidence rule requires the trial court to start with the presumption that the record contains evidence to sustain every finding of fact. [Citation.] The burden is upon the appellant to show there is no substantial evidence whatsoever to support the findings. [Citation.] The trier of fact . . . is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonable deducible from the evidence. [Citation.]

(*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].)

This Board interprets the state's alcoholic beverage law, and does not have jurisdiction to interpret or apply provisions of the San Francisco Planning Code. (See Bus. & Prof. Code, §§ 23038, 23787 [defining and articulating requirements of a "bona

fide public eating place"].) Unlike the San Francisco Planning Code, the state's alcoholic beverage laws do not impose a minimum sales requirement, but rather focus on the kitchen and its equipment as well as the type of meals served. (See *ibid.*)

The ALJ made the following finding:

> Food is always offered with wine selections, thus making wine service incidental to food service. The Department investigated whether the Applicant satisfied the requirements of the Type-41 licensure and found that Birba fulfilled the requisites of a bona fide public eating place. Birba acknowledged it is required to function as a bona fide public eating place pursuant to the Petition for Conditional License. (State's Exhibit 2 - Attachment E) The evidence establishes that Birba is operating as a bona fide public eating place in accordance with the laws of the State of California.

(Findings of Fact, ¶ 5.) We are bound by this factual finding provided it is supported by substantial evidence.

During the administrative hearing, Valgiusti was questioned at length regarding the kitchen, the staff, and the food served at the licensed premises. (RT at pp. 57-58, 84-90, 114-115.) Respondent's lunch menu was also admitted into evidence. (See Exh. A.) The testimony and documentary evidence supports the inference that respondent is operating as a bona fide public eating place under the laws of the state.

It is true that Valgiusti testified that sales of alcohol currently exceed sales of food:

> [BY JUDGE LOEHR:]
> Can you answer the question as of the date you opened, serving food and serving alcoholic beverages to this point in time, do you know [what] the percentage is?
>
> [MS. Valgiusti:] Exact percentage?
>
> JUDGE LOEHR: An approximation if you can make an approximation. No guessing.
>
> THE WITNESS: No guessing. It's growing every day. There are

return customers coming back to eat meals. Probably 35 to 45 percent.

JUDGE LOEHR: What?

THE WITNESS: Thirty-five to 40 percent in food. Relatively — I mean if you were going to take away the monetary value and just talk about —

JUDGE LOEHR: He's talking about gross sales.

THE WITNESS: Gross sales, it's hard to say because a customer can have a glass of champagne for $19 and order, you know, a piadina for $12, so it's not equal.

JUDGE LOEHR: Would it be 50/50, though?

THE WITNESS: Only if the piadina were 17 — only if the piadina were the same as the glass of champagne.

JUDGE LOEHR: But you're breaking it down in monetary terms?

THE WITNESS: I believe in my 41 it's gross sales. So it's sales of wine equals sales of food.

JUDGE LOEHR: I see what you're saying. Do you stick with the 35 to 40 percent?

THE WITNESS: Uh-huh.

(RT at pp. 102-103.) Valgiusti also testified, however, that the premises had only been open one month at the time of the hearing. (RT at p. 59.) It is true that if respondent continues this sales pattern and does not adjust its business practices, it may indeed run afoul of the San Francisco Planning Code in the months ahead. (See RT at p. 103.) If it did, enforcement of that law would still lie outside the jurisdiction of this Board. As noted, respondent complies with all state law requirements of a bona fide public eating place, and that is the only relevant question on appeal.

II

Appellants contend the Department did not conduct a thorough investigation and

failed to "independently verify accuracy and origin" of the documents it relied on its licensing report. (App.Br. at p. 8.) According to appellants, the error prejudiced them:

> To the extent that the ALJ relied upon the Department's reports, his judgment as to the credibility of the appellants and his reasoning as to why additional conditions should not be required would be completely unfounded. Appellants strongly believe that had the Department done a more thorough investigation, the ALJ's decision would have been more favorable to the appellants.

(App.Br. at p. 9.)

Appellants, however, do not identify with specificity which documents are inaccurate. This Board is therefore unable to determine whether the Department's reliance on said documents was misplaced. "An appellate court is not required to examine undeveloped claims, nor to make arguments for parties." (*Paterno v. State of Cal.* (1999) 74 Cal.App.4th 68, 106 [87 Cal.Rptr.2d 754].)

A review of the documents entered into evidence shows a thorough investigation took place. Appellants have not shown otherwise.

III

Appellants object to respondent's modification of the premises diagram on its form ABC-257. Appellants point out that throughout the 312 notification period, the premises diagram included the patio area, leading appellants to focus their protests on the use of that space. (App.Br. at pp. 11-12.) Appellants argue that "no reasonable person could have assumed that the patio would later be removed from the proposed premises prior to the issuance of a license." (App.Br. at p. 12.) Appellants contend that by failing to re-notice the modified layout, the Department deprived them of the opportunity to revise their letter of protest and "precluded the appellants as well as the other protestants from raising issues specific to applicant's operations solely within the

interior space of the applied-for premises." (App.Br. at p. 12.) Appellants argue the Department exceeded its authority under rule 64.2 by failing to re-notice the application.

Rule 64.2 provides, in relevant part:

> (a) Premises and Activity Diagram.
>
> (1) Prior to the issuance or transfer of a license, the applicant shall file with the department, on forms furnished by the department, a complete detailed diagram of the proposed premises wherein the license privileges will be exercised.
>
> [¶ . . . ¶]
>
> (b) Substantial Physical Changes of Premises or Character of Premises.
>
> (1) After issuance or transfer of a license, the licensees shall make no changes or alterations of the interior physical arrangements which materially or substantially alter the premises or the usage of the premises from the plan contained in the diagram on file with [their] application, unless and until prior written assent of the department has been obtained.
>
> For purposes of this rule, material or substantial physical changes of the premises, or in the usage of the premises, shall include, but are not limited to, the following:
>
> (A) Substantial increase or decrease in the total area of the license premises previously diagrammed.

(Cal. Code Regs., tit. 4, § 64.2.)

Respondent's form ABC-257 does show a substantial reduction in the area to be licensed. The patio area is included in entire diagram. (Exh. 2.) There is a red line highlighting the perimeter of the interior space, however, and a handwritten comment in blue reading "REAR PATIO NOT LICENSED." (*Ibid.*) The written modifications reduce the licensed area by roughly half — an estimate supported by Valgiusti's testimony. (See RT at pp. 64-65). This is a substantial reduction as contemplated by the rule.

As dictated by rule 64.2, the relevant question is not whether protestants had the

opportunity to comment on the substantially reduced premises, but whether respondent obtained "written assent of the department" before making the modifications.

The evidence indicates respondent made the changes with the Department's prior written assent. The investigation report includes the following commentary:

> The protestants [*sic*] apartment is adjacent to the rear patio area of the applied-for premises. The protestants are concerned about noise emitting from the rear patio from the patrons of the premises utilizing this outside area.
>
> The rear patio is NOT part of the applied-for premises. The applicant has also signed an acknowledgement they must notify the Department, and the Department will conduct an investigation to determine the patio's suitability for licensing.
>
> The applicant is required to apply for a conditional use authorization with the San Francisco Planning Department to utilize the rear outdoor patio as part of their licensed area[.]
>
> The protest issue is unsubstantiated. However, the applicant agreed to and signed conditions to alleviate any potential problems such as prohibition of any audible noise and loitering. Additionally, the applicant has signed an acknowledgement that the rear patio is not part of the licensed premises.

(Exh. 2.) The patio acknowledgment is appended to respondent's application. (*Ibid.*) It reads:

> The above applicant hereby acknowledges that at this time, the licensed premises shall include only the interior portion of the business, that is, the area contained within the building walls.
>
> The above applicant further understands that any sales, service, or consumption of alcoholic beverages outside the building, such as in the outdoor back yard patio, as depicted on the ABC 257, dated 04/22/14, would constitute a violation of Section 23300 of the Business and Professions Code, and subject the alcoholic beverage license to suspension or revocation.
>
> In the event that the above applicant decides to expand the licensed premises to include the rear patio area at a future date, applicant understands that he must first submit a letter to the Department requesting such expansion. Also an investigation will then be conducted

> to determine the patio's suitability for licensing. However, applicant will **not** be permitted to utilize such area until the applicant receives written authorization from the Department.

(*Ibid.*, emphasis in original.) We are satisfied that the modification was made in compliance with rule 64.2, and that no additional notice period was required.

Moreover, the licensing report explicitly references protests objecting to the use of the rear patio. In essence, appellants got what they wanted — the patio area was eliminated from this license application, and respondent will be required to undergo a new review and investigation, with an additional notice period, should it later seek to license the patio as well. If appellants *also* had objections to the use of the interior space, nothing prevented them from raising those objections in their initial protest.

IV

Appellants contend that the factual finding in the decision below that respondent agreed to forego use of the patio in order to protect residents' quiet enjoyment is not supported by the evidence. Appellants contend that "the rear patio was removed from the project, not as a concession to the neighbors in an effort to protect the quiet enjoyment of their property as claimed by the applicant, but rather to avoid the need to seek Conditional Use Approval which would have further delayed the project." (App.Br. at p. 14.)

As noted above, the findings below will be reviewed for substantial evidence. This Board, however, will not reverse for an alleged defect in the decision below unless the appellant has shown the defect was prejudicial — that is, that a different result was probable had the defect not occurred. (See Code Civ. Proc., § 475.) "The burden is on the appellant in every case affirmatively to show error and to show further that the error is prejudicial." (*Vaughn v. Jonas* (1948) 31 Cal.2d 586, 601 [191 P.2d 432].)

The ALJ made the following findings of fact:

> 10. Ms. Valgiusti takes the issue of the nearby resident's [*sic*] quiet enjoyment of their property very seriously. This is manifested in her willingness to forego the use of the outdoor, back patio. Initially, the back patio was an integral part of the Applicant's business plan. However, Ms. Valgiusti has relinquished this opportunity as a concession to the neighbors in an effort to protect the quiet enjoyment of their property. This is a significant sacrifice and may hinder the financial success of Birba.

(Findings of Fact, ¶ 10.)

The evidence, however, suggests that respondent did not voluntarily forego the use of the patio out of concern for the neighbors, but rather yielded to pressure from the Department and the San Francisco Planning Department. In fact, respondent's attitude toward the neighbors was rather antagonistic:

> [BY MS. TECHEL]
> Q. And you stated earlier that you hoped to open in April 2014; is that correct?
>
> A. Correct.
>
> Q. What was the cause of the delay of a year?
>
> A The cause of the delay was from the neighbors at 470 with the — making the inside space go to discretionary review which took about, I believe, seven months to actually happen. Which, in that time, we couldn't do construction. We couldn't do anything until that happened. So that was a big delay.
>
> Q. Are you talking about the planning process?
>
> A. Correct. The discretionary review with the Planning Department.
>
> Q. So is it correct that no conditional use permit is required for the use of the inside of your space as a restaurant?
>
> A. Correct.
>
> Q. And is it correct that the discretionary review process was triggered by a complaint from the protestant?

A. Yes.

MR. COLTON: I'm sorry. From me? Is that what you're saying?

BY MS. TECHEL:

Q. Let me rephrase. Is it correct that the discretionary review was triggered by one of the four people who made a validated protest of the ABC license?

A. That's to my knowledge.

Q. Okay. And did the discretionary review process come to a resolution?

A. Yes. We — Birba won 7-0 with support from the planning committee.

Q. And what was the resolution?

A. The resolution was *we were allowed to open inside of the space.* The main condition was that we didn't approach the Planning Department for six months after the day of the opening to discuss the conditional use on that garden space.

(RT at pp. 59-60, emphasis added.) Indeed, Valgiusti testified regarding changes to respondent's business plan following the "loss" of the outdoor patio space. (RT at p. 64.) Moreover, according to Valgiusti's own largely unprompted and confrontational testimony, respondent passed on protestants' offer to drop their complaints in exchange for respondent's agreement not to use the outdoor space:

BY MR. COLTON:

Q. Do you agree with Ms. Techel's assessment of your financial condition being attributed primarily to protestants, or do you acknowledge that there are other factors in play that we have nothing to do with?

A. I would say that before the discretionary review date approached, I e-mailed Mike Welch, which is one of your neighbors, and asked you guys if you would drop the discretionary review process if I would — for me to just get open on the inside, and his response was if I agreed to waive my right *to ever use the garden*, then you would consider doing that. Otherwise we were going to the discretionary review.

That process was — I think we — our hearing was in September, September 11th. And if that didn't happen, we would have been in construction in that time. So to say that there was no — that you guys had no part in my financial loss — I don't agree to that.

Q. Are you aware that I and my partner did not participate in the discretionary review process? We did not file with the city?

A. Okay. Thank you.

Q. We did not join the cause.

A. Thank you.

Q. So we —

A. Am I incurring legal fees to be here at this moment? Yes.

Q. It's not my free time either.

MS. TECHEL: Objection. Not a question.

JUDGE LOEHR: I'm going to stop this right now.

(RT at pp. 98-99, emphasis added.)

Finally, interviews with Valgiusti in local media all suggest that respondent fully intends to pursue use of the garden space as soon as possible, regardless of protestant's concerns. "[Birba's] best potential feature isn't even open yet: a pocket garden in back. Valgiusti has to wait six months to apply for a conditional-use permit to open the space, prompted by neighbor concerns about noise." (Exh. B.)

Originally planned to include an outdoor "wine garden" in back, some neighbor concerns over the possibility of late-night noise and activity from the patio area prompted a discretionary review of the plans, which resulted in approval for Birba, but not for the patio (yet). After six months in operation, Birba will be able to apply for a conditional use permit to operate the patio.

"So many gardens in Hayes Valley are being ripped out for condos — the beauty of this space is the garden. I really want that space open to people," said Valgiusti.

(Exh. P-III.)

We agree with appellants that the findings below regarding respondent's motivations toward the garden space are not supported by substantial evidence. The evidence uniformly supports the conclusion that Valgiusti considers the loss of the patio a detriment to her business, both financially and aesthetically, and did not voluntarily forego its use out of concern for neighbors' quiet enjoyment.

The question, then, is whether Valgiusti's personal motivations have any bearing on the outcome of this case. Regardless of whether respondent voluntarily passed up the opportunity to open the garden or was forced to temporarily forego its use because of the San Francisco Planning Deparment's conditional approval, the result is the same: the license issues without the patio space, and respondent will need to undergo further review — with additional opportunities for neighbors to protest — in order to open the outdoor patio space. The error, though understandably aggravating for the appellants, was not prejudicial.

V

Appellants contend that the two conditions contained in the Petition for Conditional License are insufficient to protect nearby residents' quiet enjoyment. Appellants argue that the condition related to noise, in particular, is too vague:

> In and of itself appellants believe that the "no noise" condition affords the applicant far too much control and discretion in determining what an acceptable noise level should be as it leaves it up to her sole discretion to decide when it is too loud to leave the rear door or rear windows open.

(App.Br. at p. 16.)

Rule 61.4 provides, in relevant part:

> No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either

of the following conditions exist:

(a) The premises are located within 100 feet of a residence.

[¶ . . . ¶]

Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to-premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents.

(Cal. Code Regs., tit. 4, § 61.4.) The ALJ found that "[t]he Applicant has established that the operation of Birba will not interfere with the quiet enjoyment of nearby resident's [*sic*] property." (Determination of Issues, ¶ 3.)

Condition 1 — the only license condition directed at noise — reads, "Noise shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 04/22/2014." (Petition for Conditional License, Exh. 2.) Presumably, this condition means that any audible noise outside the interior licensed space of the premises would constitute a violation. Facially, the condition is broad enough to encompass the specifics of which appellants complain — the opening of a door or window, for instance, with the result that noise becomes audible outside the interior space, would constitute a violation of a license condition. (See Bus. & Prof. Code, § 23804.) A more specific condition — for example, providing that the rear windows or door must remain closed during business hours — would not supply the same broad protection that the current condition provides. Under its current language, appellants may file a complaint against respondent for *any* noise — however it is produced — that is audible outside the licensed premises.

We are troubled, however, by the apparently cavalier attitude the decision takes toward the noise complaints appellant has already filed with the Department. The

decision inappropriately implies that appellants ought to have contacted Valgiusti personally before filing a noise complaint — something they are not, in fact, required to do, and which may only aggravate the interpersonal conflict apparent in the hearing transcript. (See also Part VII, *infra*.) Moreover, there is a factual finding that, on one occasion, the external sound system was "accidentally turned on."[2] (Findings of Fact, ¶ 11.) The decision merely notes that this "was a mistake that has not been repeated."[3] (Findings of Fact, ¶ 11.)

This Board cannot and will not try the facts of an alleged violation. We nevertheless note that even "accidental" use of the outdoor speaker system constitutes a violation of the license condition, as intent is not an element of a section 23804 condition violation. We hope that in the future, the Department will take appellants' noise complaints seriously and investigate appropriately, and not casually ignore an admitted violation simply because the licensee insists it was unintentional.

VI

Appellants contend that the finding that respondent's soundproofing has been effective is not supported by the evidence. Appellants argue they "went to great lengths in the hearing to demonstrate that the soundproofing is only effective at mitigating

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[2]Interestingly, this admission appears to confirm one of the noise complaints appellant filed — which the Department apparently found to be unsubstantiated. (See Exh. P-X.) This Board, however, presently has no jurisdiction to determine whether appellants' complaints were factually substantiated, or whether respondent has in fact violated a license condition.

[3]Although respondent argues the speakers were installed by the previous occupant (Findings of Fact, ¶ 11), their continuing presence — and the ease with which they were "accidentally" turned on — functionally undermines respondent's supposedly "effective" efforts to soundproof the premises. (See Findings of Fact, ¶¶ 10-11; see also Part VI, *infra*.)

potential noise when the rear door and windows are closed." (App.Br. at p. 18.)

As discussed above, appellants must show first that the finding was indeed erroneous, and second, that the error was prejudicial. (See Part IV, *supra*.)

The decision below finds that "Valgiusti spent considerable monies in an effort to soundproof the restaurant and wine bar" and that "[t]he soundproofing has been effective." (Findings of Fact, ¶ 10.) Unfortunately, it is unclear what standard the ALJ employed to determine its effectiveness. Appellants concede the soundproofing is effective "when the rear door and windows are closed." (App.Br. at p. 18.) We can also infer that the soundproofing becomes ineffective when premises staff accidentally turn on the outdoor speaker system. (See Findings of Fact, ¶ 11; see also Part V, *supra*.) Without a concrete standard, we cannot say whether the finding is erroneous.

In the end, however, whether the soundproofing is effective — or indeed, whether it exists at all — does not change the outcome of this case. Respondent's conditional license provides that "Noise shall not be audible beyond the area under the control of the licensee(s)." (Petition for Conditional License, Exh. 2.) Investing in effective soundproofing is therefore a wise business strategy, since it reduces the likelihood that interior noise will be audible outside respondent's premises. Requiring staff and patrons to keep the doors and windows closed would be another wise business choice (see Findings of Fact, ¶ 11; Exh. G), as would removing or disabling exterior sound system speakers.

Notably, the broad drafting of condition 1 allows protection of nearby residents' quiet enjoyment *regardless of respondent's business decisions*. A catchall prohibition against noise audible outside the licensed premises is more effective than a long series of conditions addressed at narrow, specific issues such as doors or windows.

Regardless of what business choices respondent makes — that is, regardless of whether it invests in effective soundproofing, or promptly undermines that soundproofing by, for example, opening a window or turning on an outdoor sound system — it must still ensure that no noise is audible outside the licensed premises.

VII

Appellants contend the ALJ improperly considered appellants' failure to directly contact respondent about noise issues. Appellants observe that "[a]lthough it may be the stated policy of the ABC to encourage opposing parties to resolve issues amongst themselves, there is no actual requirement that we do so." (App.Br. at p. 23.)

As above, appellants must show first that the finding was indeed erroneous, and second, that the error was prejudicial. (See Part IV, *supra*.)

The ALJ found that "[t]he Protestants did not contact Ms. Valgiusti about their complaints on any of the occasions they filed complaints. [Citation.] Mr. Colton testified that he has never 'reached out' to Ms. Valgiusti about his 'noise' complaints." (Findings of Fact, ¶ 11.)

The Department's Complaint Against Licensee Form ABC099-E explicitly states "It is not required that you give 'Information About You.' *You may remain anonymous*. If you do give personal information, it will not be released outside the department and will remain confidential." (Exh. P-X, emphasis added.)

It is therefore perplexing indeed that the ALJ found it relevant that appellants did not contact Valgiusti about their complaints. Appellants were well within their rights in declining to first contact respondent before filing a complaint — and indeed, likely followed a wise course of action, given the animosity apparent in the hearing transcript. (See, e.g., RT at pp. 98-99.) Moreover, appellants' complaints were independently

investigated (see Findings of Fact, ¶ 11) and were not directly at issue in the proceedings below. Finally, there are no credibility findings in the decision below, nor are we convinced that this fact would be relevant to a credibility assessment. The finding therefore appears to be nothing more than an unnecessary and oblique commentary on the validity of appellants' complaints.

While the finding was certainly unnecessary, it does not follow that it must therefore be erroneous, or that it constitutes prejudicial error. The finding is accurate; appellants — perhaps wisely — did not contact Valgiusti about their noise complaint. Moreover, if the finding is omitted entirely from the decision, the outcome is still the same — the Department investigated the complaints and found "very minimal" noise, supporting the inference that respondent is complying with its license condition. (See Findings of Fact, ¶ 11.) Whether appellants first contacted Valgiusti, and whether that fact was unnecessarily written into the decision, does not change this inference. This Board therefore finds no prejudicial error.

For clarity, however, we note that should appellants file complaints against this or any other licensee in the future, they are *not* required to first contact the licensee directly, nor should their failure to do so be interpreted by the Department as evidence that their complaint is invalid.

VIII

Appellants contend that the Department has not enforced condition 1. Appellants "were given assurances by the investigating officer, Riselwyn Melodias, that the 'no noise audible' standard was so strict that any noise that we heard from the rear patio or applicant's premises would be considered a violation." (App.Br. at p. 24.) According to appellants, they filed two separate complaints regarding noise that took

place during a period of warm weather — when respondent had opened its rear door and windows. (*Ibid.*) The complaints were supported by a photograph of the open rear door. (App.Br. at p. 25.) Though appellants contend they "made a point of stressing that [the officer] was unlikely to find any violation of the noise condition as the weather had turned cold and [respondent] was no longer leaving the rear door and windows open," the Department nevertheless failed to take corrective action.

It is not within the jurisdiction of this Board to retry the facts below, let alone try the facts of an alleged violation the Department never pursued. (See Part I, *supra*.) Indeed, we do not have the full facts of the complaint investigations before us. With very few facts and no jurisdiction, we cannot independently find a condition violation where the Department has found none.

We do, however, sympathize with appellants insofar as it may be difficult — if not impossible — to produce an agent or officer at the very moment a noise violation is taking place. Appellants appear to recognize this, as they claim to have produced a photograph of respondent's open rear door. An open rear door, however, does not necessarily lead to audible noise. It is the *noise*, after all, which appellants ultimately seek to prevent.

We therefore encourage appellants to take steps to independently document noise violations as they occur, ideally in a fashion that makes the *noise itself* apparent.

This does not necessarily require access to an expert, as discussed at oral argument. Modern technology allows easy access to amateur videography, often on a handheld tablet or cell phone, and typically produces a concurrent audiorecording of reasonable quality. Higher quality recording equipment, if necessary, is available on the consumer market.

Additionally, appellants should maintain a written log of the dates and times they witnessed noise emanating from the licensed premises, the type of noise, and any other pertinent information (such as whether premises doors and windows were open).

As counsel for the Department acknowledged at oral argument, appellants are entitled, as citizens, to file an accusation:

> Accusations may be made to the department *by any person* against any licensee. Accusations shall be in writing and shall state one or more grounds which would authorize the department to suspend or revoke the license or licenses of the licensee against whom the accusation is made.

(Bus. & Prof. Code, § 24201, emphasis added.) This Board expects — and the Department appears to agree — that citizen accusations alleging a well-documented violation of a license condition will be taken very seriously.[4] Moreover, if the current condition proves insufficient and appellants document repeated violations, the Department can introduce further license conditions in the course of imposing disciplinary action. (See Bus. & Prof. Code, § 23800(b).)

Finally, appellants should supply any documented evidence of noise or other nuisance at the licensed premises to the city attorney, so that the city remains fully informed and can take appropriate action under the San Francisco Planning Code and any other relevant local laws.

In the meanwhile, we agree that the condition, as presently drafted, is sufficiently

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[4]We further expect the Department to accurately inform the public of its rights. It appears that appellants were not aware until oral argument that they had a right to independently file an accusation — without need to rely on Department agents — should respondent violate its license conditions or a relevant provision of law. While we do not expect the Department to act as counsel or legal advisor to any member of the public, we find it deeply troubling that this case progressed all the way to this Board without appellants being informed of such a significant method of recourse.

broad and objective to protect appellants' quiet enjoyment.

IX

Appellants contends that the "audible noise" standard applied by the Department in this case is arbitrary and inconsistent. Appellants refer this Board to several cases, one of which holds that "[w]hile penalizing noise heard a few feet away from the premises could be arbitrary, music and lyrics heard from 100 to 150 feet from the premises is a clear violation of the condition." (*Slim's* (2010) AB-9006, at p. 8, citing *Wichman* (1997) AB-6637, at p. 4.)

In *Slim's*, the licensee appealed a Department decision finding it violated a condition substantially similar to respondent's. (*Slim's*, *supra*, at pp. 2-7.) The licensee argued, among other things, that the condition was unconstitutionally vague and invited arbitrary and inconsistent enforcement. (*Id.* at p. 7.) This Board held that the condition was neither vague nor arbitrary and was properly enforced against the appellant-licensee. (*Id.* at pp. 8-9.)

We reiterate the pertinent holding in *Slim's* here: "The condition, as written, appears to be fairly straightforward. If entertainment noise reaches beyond the area under the control of the premises, the condition is violated." While the Board went on to explain that, in certain circumstances, prosecution for noise heard a few feet beyond the premises might be arbitrary or abusive, it also repeated language from *Wichman* observing that "the condition is clear on its face and the enforcement one of extreme importance to the quiet enjoyment of residents." (*Slim's*, *supra*, at p. 8, citing *Wichman*, *supra*, at p. 4.) In emphasizing the importance of the condition to the protection of nearby residents, the Board cited the United States Supreme Court:

> It can no longer be doubted that government "ha[s] a substantial interest in protecting its citizens against unwelcome noise." . . . This interest is perhaps at its greatest when government seeks to protect "the well-being, tranquility, and privacy of the home," . . . but it is by no means limited to that context, for the government may act to protect even such traditional public forums as city streets and parks from excessive noise.

(*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 796 [109 S.Ct. 2746], citations omitted.)

To paraphrase, any noise "audible beyond the area under the control of the licensee(s)" will, in this case, constitute a facial violation of the condition. (See Petition for Conditional License, Exh. 2.) In some cases, prosecution for a violation may indeed be arbitrary — or, phrased differently, would punish the licensee while doing nothing to protect nearby residents' quiet enjoyment. To provide an example, it may be arbitrary for the Department to prosecute respondent if the footsteps of an arriving patron are audible as he approaches the front door of the premises, or if some noise leaks out as he enters. Because appellants' apartment is to the rear of the licensed premises and these noises are minimal, punishing respondent would likely do little to protect appellants' quiet enjoyment. On the other hand, respondent's staff slamming the rear door while taking out the garbage after closing *would* likely have a marked negative impact on appellants' quiet enjoyment, and prosecution would protect appellants by discouraging such conduct in the future.

We are not presently examining the facts of an alleged violation, and we will not do so unless and until such a violation comes before us on appeal. We emphasize, however, that this condition is facially unambiguous, and that for the condition to fulfill its stated purpose of protecting the quiet enjoyment of nearby residents, it is *imperative* that the Department actively prosecute any violations that put that appellants' quiet

enjoyment at risk.

X

Appellants contend that findings regarding the level of noise on a busy night are based on misleading evidence. In particular, appellants object that the video respondent entered into evidence — purportedly taken during one of respondent's busiest nights — is very brief and does not accurately portray the noise issue because the rear door and one of the windows are closed, while the other window, connected to the kitchen, is only partially open. (App.Br. at pp. 27-28.) Appellants correctly point out that no evidence was presented regarding the level of noise when these windows and doors are open. (App.Br. at p. 28.)

As discussed above, appellants must show first that the finding was indeed erroneous, and second, that the error was prejudicial.

The ALJ found:

> the Applicant made a sound recording of patron noise from outside Birba on a very busy night. The noise was negligible and would not amount to a violation of the current condition, nor could a reasonable person consider the ambient sounds an infringement of a resident's quiet enjoyment of their property.

(Findings of Fact, ¶ 11.)

We question the ALJ's apparent inference that because a condition violation was not taking place at the precise moment Valgiusti recorded the video, appellants' noise concerns are unfounded. Naturally, a licensee is unlikely to enter into evidence a video of their premises actively violating a license condition; they will instead choose a moment when the premises fully complies. As with the finding that appellants did not make contact with Valgiusti regarding their noise complaints, the ALJ's finding that the noise in respondent's video "would not amount to a violation" is unnecessary and

unhelpful, but not erroneous.

We would add, however, that the video *is* helpful for determining what degree of sound emanates from the premises when the doors and windows are closed. This supports the inference that respondent is capable of complying with the condition when it wishes to do so — that is, that noise is not generally audible outside the licensed premises, assuming respondent is diligent about closing its doors and windows when interior noise levels rise. The video supports the conclusion, reached below, that condition 1 is sufficient to protect appellants' quiet enjoyment, and that the license should issue.

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.