

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

AB-9869

File: 47-467454; Reg: 19089150

McDINI'S RESTAURANT CORPORATION,
dba McDini's Irish Cantina
105 East 8th Street
National City, CA 91950,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

Appearances: *Appellant:* Benjamin Adler, in propria persona, for McDini's
Restaurant Corporation,

 Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

McDini's Restaurant Corporation (McDini's), doing business as McDini's Irish Cantina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ (Department), denying its Petition to Modify Conditions (Petition).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on August 22, 2008. The license permits it to serve beer, wine, and distilled spirits for on-sale consumption in conjunction with a bona-fide restaurant.

¹The decision of the Department, dated February 24, 2020, is set forth in the appendix.

Conditions were originally placed on the license in 1987, when it was held by a previous owner. The original conditions were imposed pursuant to a protest against unconditional licensing by the Chief of Police of National City, and National City Resolution #15,121. (Finding of Fact, ¶ 2.) Resolution #15,121, dated November 11, 1986, approved a conditional use permit (CUP) which was subject to revocation if the Chief of Police determined that the operation of the premises resulted in a 10 percent increase in the demand for police services. (Finding of Fact, ¶ 3; Exh. 4.)

As part of a person-to-person transfer of the license, the conditions were carried forward to the current license when a Petition for Conditional License was signed by the present corporate officers—Benjamin Adler and Charlton Adler—on behalf of McDini's on June 10, 2008. (Exh. 3.) Those conditions state:

1. Alcoholic beverage sales shall be incidental to food service.
2. No dancing shall be permitted on the premises.
3. Live entertainment shall be permitted only on Thursdays, Fridays, and Saturdays until 12:00 Midnight.
4. Operation of the licensed premises shall at all times be in accord with National City Council Resolution Number 15,121, incorporated herein as Exhibit 1.

(Ibid.)

Appellant was disciplined in 2009 for violating its dancing prohibition and live entertainment restrictions, in violation of Business and Professions Code section 23804, and suffered a 15-day suspension, with five of those days stayed for one year. (RT 19-21; Exhs. 2-5.) In 2010, National City filed a nuisance abatement action against the premises for failure to comply with the conditions of their CUP. On December 17,

2010, a Stipulated Judgment was entered, requiring, among other things, that no live entertainment be allowed in the premises and that appellant obtain a new CUP from National City. (Finding of Fact, ¶ 6.)

In 2012, appellant obtained a new CUP, pursuant to Resolution 2012-14, which stated: “No live entertainment, dancing, or construction of any stage or dancing area may commence until the stipulated judgment has been rescinded or modified appropriately so as to allow for such activities.” (Exh. 11.) The resolution also provided for revocation in the event the demand for police services at the premises increased by 10 percent. (Finding of Fact, ¶ 7.) On June 17, 2013, the CUP was revoked due to a 750 percent increase in calls for police service at the premises. (Finding of Fact, ¶ 8.)

The city attorney for National City petitioned the court to reinstate the prohibition of live entertainment at the licensed premises, based on the terms of the Stipulated Judgment (exh. 8) which was still in place. On September 12, 2013, a San Diego County Superior Court Judge issued an Order After Ex Parte Hearing to Reinstate Prohibition of Live Entertainment (exh. 9). The Order enforced the existing Stipulated Judgment, and specifically prohibited all live entertainment, included dancing, at the premises. (Finding of Fact, ¶ 9.)

On September 7, 2018, the licensee submitted its Petition, in the form of a letter to the Department, asking to remove the no-dancing condition (condition number two) on its license, and to modify condition number three to extend the hours of live entertainment at the premises to 2 a.m. (Exh. 1.) Later, at the administrative hearing, the issue regarding live entertainment hours was withdrawn and only the no-dancing condition was argued. (RT 10.)

An administrative hearing was held on October 29, 2019. Documentary evidence was received and testimony concerning the Petition was presented by Department Senior Agent in Charge (SAC) Melissa Ryan; Mitchell Dean, an attorney representing National City; and Lt. Gregory Seward, an officer with the National City Police Department (NCPD). Lawrence Frankel, an attorney who formerly represented McDini's, and Manuel Rodriguez, an individual who resides approximately 150 feet from the premises, testified on appellant's behalf.

Testimony established that SAC Ryan ordered an investigation into the condition modification request, as per normal Department procedure when a petition to modify conditions is received. An investigation was conducted by Licensing Representative (LR) Maritza Gonzalez, to determine whether the conditions should be modified or removed. LR Gonzalez went out on leave before the report was completed, so the final report (exh. 5) was prepared by SAC Ryan.

SAC Ryan testified that the no-dancing condition is part of a set of conditions designed to prevent appellant from operating as a nightclub. Nightclubs typically have type-48 licenses which do not require the service of food, and which forbid minors in their premises. She explained that restaurants that function as nightclubs tend to have issues with underage drinking and difficulties with their food service requirements. (RT 25-27.)

SAC Ryan also testified that the Department was notified of law enforcement problems at the premises between 2008 and 2012, with reports of fights, stabbings, and disorderly activity. (RT 27-28.) As part of the investigation, LR Gonzalez contacted both law enforcement and the City to see if they objected to the Petition.

In response, LR Gonzalez received an email on January 10, 2019, from an attorney for National City, Nicole Pedrone, requesting that the request to modify conditions be denied since appellant's CUP had been revoked and a court order was in effect prohibiting live entertainment at the premises. The email states in part:

Please note that the petition should be denied as there is a court order that states that absolutely no live entertainment is permitted at any time. The applicant knows about this order which has been the subject of a lot of civil litigation and appeals. The court order is still valid. It states in the petition that a current condition is that live entertainment is permitted on Thursdays, Fridays, and Saturdays until 12:00 midnight. That is not correct. Any CUP this applicant had from our City to do live entertainment was revoked. In addition, like I mentioned above, there is a valid court order prohibiting this.

(RT 29-30; Exh. 6.)

LR Gonzalez also received an email on January 30, 2019, from NCPD Sgt. Wade Walters requesting that the Petition be denied. He noted that NCPD has had numerous issues with shootings, fights, unruly customers, public drunkenness, and neighborhood quality-of-life problems with the premises. He also mentioned the court order which is in effect prohibiting live entertainment, including dancing, at the premises. (RT 30-31; Exh. 7.)

Based on the investigation, SAC Ryan recommended that the Petition be denied. Her recommendation took into account the recommendations of National City and the NCPD. She noted that the current no-dancing condition is effective at preventing restaurants from operating as nightclubs, thereby preventing the types of law enforcement problems associated with nightclubs, and that the grounds which originally caused the imposition of the condition still exist. (RT 31-32; 62-63; Exh. 5.)

Mitchell Dean, an attorney who provides legal services to National City and other municipalities, confirmed that National City opposes the removal of the no-dancing condition. Mr. Dean testified that he visited the premises pursuant to extensive litigation between appellant and National City. (RT 65, 78.) He testified that the City brought a nuisance abatement action against appellant in 2010 for failing to comply with its CUP, including issues involving live entertainment and dancing, as well as higher than normal calls to the police, gang activity, and violence at the premises. (RT 71-72.) A court order was issued in December of 2010, giving National City additional powers to regulate the premises, resulting in approximately five subsequent civil cases between appellant and National City. (RT 65-70; Exh. 8.)

Mr. Dean testified that in 2012, National City issued a new CUP to appellant, which allowed dancing, but which included a clause that allowed the City to revoke the CUP if a significant increase in calls for police service occurred. In March 2013, the planning commission determined that appellant was not compliant with the CUP, because of increased calls for police service, and the CUP was revoked. Appellant appealed the revocation but it was upheld by the City Counsel. National City returned to court and obtained a court order prohibiting all entertainment, including dancing, which is still in effect. (RT 72-78; Exh. 9.) Mr. Dean testified that appellant does not currently have a CUP from National City² — a prerequisite for dancing to be allowed on the premises. (RT 78.)

² Appellant maintains the 1986 CUP became the “default” CUP when the 2012 CUP was revoked. (AOB at p. 2; ACB at p. 2.) Whether or not the premises has a current CUP from the City is outside the scope of this Board’s jurisdiction.

Lt. Gregory Seward, an NCPD officer of 21 years, testified that the premises has had issues with fights, public drunkenness, and noise since 2008 because of events which attracted large crowds to the bar via promotions. (RT 102-104.) Lt. Seward noted long lines wrapping around the block during these promotions, people drinking in their cars, fights, and drinking in the surrounding areas, as well as trash, beer cans, and beer bottles afterwards. (RT 104-105.) Lt. Seward testified that the premises are a drain on police resources and he reiterated the Police Department's request that the premises not be allowed to have dancing. (RT 105-107.)

Appellant's former attorney, Lawrence Frankel, testified that he has visited appellant's premises and has not noted any issues with criminal behavior. (RT 14-17.) Mr. Rodriguez, who lives in a building approximately 150 feet from the premises, has lived there for two and a half years. He testified that he is not aware of any issues with appellant's premises and has never noticed any criminal activity inside the restaurant. (RT 126-133.)

Following the hearing, the administrative law judge (ALJ) issued a proposed decision on December 13, 2019, finding that the original reasons for imposing condition number two still exist, and recommending that the Petition be denied. The Department adopted the proposed decision in its entirety on February 20, 2020, and a certificate of decision was issued on February 24, 2020, denying the Petition.

Appellant then filed a timely appeal contending condition two on the license should be removed, and that the Department's decision denying removal of the condition is vague, lacks standing, and constitutes an abuse of discretion. (AOB at p. 2.) These issues will be discussed together.

DISCUSSION

I

NEWLY DISCOVERED EVIDENCE

Prior to filing its opening brief, appellant filed two “Affidavits for Newly Discovered Evidence,” seeking in both instances to augment the record produced after the administrative hearing. In deciding whether to allow such an augmentation, this Board must consider “[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.” (Bus. & Prof. Code, § 23084(e); Cal. Code Regs., tit. 4, § 198.)

Business and Professions Code section 23085 directs:

In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department.

(Bus. & Prof. Code, § 23085.)

The “reasonable diligence” standard for the introduction of new evidence also appears in the Code of Civil Procedure:

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes

[¶ . . . ¶]

4. Newly discovered evidence, material for the party making the application, *which he could not, with reasonable diligence*, have discovered and produced at the trial.

(Code Civ. Proc., § 657, emphasis added.) There are many cases defining “reasonable diligence” in this context. The burden, for example, is on the moving party: “[I]t is incumbent on the moving party to show that he has exercised reasonable diligence to discover before the trial the evidence upon which he relies.” (*Pierce v. Nash* (1954) 126 Cal.App.2d 606, 620 [272 P.2d 938]; see also *Slemons v. Paterson* (1939) 14 Cal.2d 612 [96 P.2d 125] [“It does not appear from plaintiffs’ affidavit that they made any effort whatever to obtain the evidence prior to the trial”].)

In short, the exercise of “reasonable diligence” must take place *before* the trial; it is not enough to commence an investigation after the fact.

In order to obtain a new trial because of newly discovered evidence, the applicant must show that he used reasonable diligence to discover it prior to the trial and that he failed to discover it and did not, in fact, know of it in time to produce it, or in time to apply for a continuance in order that he might produce it, at the trial.

(*Pollard v. Rebman* (1912) 162 Cal. 633, 636-637 [124 P. 235].)

In the instant case, appellant sought to augment the record with evidence that *was* available at the time of the administrative hearing. Appellant offered no explanation in its affidavits for why this evidence was not offered at the hearing, no justification explaining how the material was relevant to the issues before the Board, nor any reason why the evidence described in the affidavits could not have been produced, in the exercise of reasonable diligence, *before* the administrative hearing. Accordingly, the Board denied both affidavits.

II

REMOVAL OF CONDITIONS

Business and Professions Code section 23803, subdivision (a), defines how an existing condition on an ABC licence may be removed. The language of that section, in pertinent part, states:

The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, *if it is satisfied that the grounds that caused the imposition of the conditions no longer exist*, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. *The department may not remove or modify any condition to which an objection has been filed without holding a hearing . . .*

(Bus. and Prof. Code § 23803(a), emphasis added.)

In the instant case, the Department conducted a thorough investigation to determine whether the grounds that caused the imposition of condition two on appellant's license still exist. In addition, the Department gave notice to the local governing bodies — National City and the NCPD — that a petition to remove or modify conditions had been filed. During the extensive testimony presented at the administrative hearing, representatives of both the City and Police Department offered voluminous evidence to support their contention that the grounds which caused the imposition of the conditions had not changed.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

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. [Citations.] 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 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board (1963) 212*

Cal.App.2d 106, 112 [28 Cal.Rptr. 74].)

While appellant contends the Department's decision denying removal of the condition is "vague, lacks standing, and constitutes an abuse of discretion," (AOB at p. 2.), what it is saying in essence is that the decision is not supported by substantial evidence. Therefore, we must examine the record to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the

Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, 212 Cal.App.2d at p. 114.)

In the decision, the ALJ made extensive findings of fact (see ¶¶ 1-9 and 12-20) on the issue of whether appellant met its burden of proving that the grounds which necessitated imposing the condition no longer exist, and reached the following conclusions:

4. In this case, the burden of proof is on the Petitioner to establish that the reasons which caused imposition of the condition no longer exist. The reasons for those conditions are set forth in the Petition for Conditional License, signed by the Petitioner on June 10, 2008. (Exhibit 3.) The conditions were imposed because there was a protest against unconditional licensing by the National City Chief of Police. The Petition for Conditional License provides that the Petitioner's request for modification of conditions at that time was approved by the National City Council and Chief of Police under City Council Resolution Number 15,121. One of those conditions, condition number four, provides that, "Operation of the licensed premises shall at all times be in accord with National City Council Resolution Number 15,121, incorporated herein as Exhibit 1." The said Petition for Conditional License additionally provides that issuance of an unrestricted license would be contrary to public welfare and morals. (Exhibit 3.)

5. The Petitioner presented no evidence that the reasons for imposition of its conditions no longer exist. In fact, the National City PD continues to protest any modification request by the Petitioner. The National City PD's current opposition to Petitioner's request to remove or modify its ABC conditions equates to the National City PD's continued protest against unconditional licensing. There was evidence the Petitioner was in violation of various resolutions, including, but not limited to, Resolution Numbers 15,121 and 2012-49. Specifically, the record established that operation of the Licensed Premises with live entertainment and dancing caused repeated law enforcement problems, including demands for police services. A 750 percent increase in police calls for service at the Licensed Premises involving violence and other condition violations of

City Council Resolutions 15,121 and 2012-49, occurred on various dates ranging between the calendar years 2012 and 2013. The evidence revealed that once the conditions of live entertainment and dancing were removed there were no similar law enforcement problems at the Licensed Premises. Furthermore, the record established that on September 12, 2013, a San Diego County Superior Court Judge issued an Order After Ex Parte Hearing to Reinstate Prohibition of Live Entertainment (Exhibit 9) with said Order enforcing the existing Stipulated Judgment (Exhibit 8), and prohibited at the Licensed Premises all live entertainment, which included dancing. As of the date of the hearing said Order continues to prohibit live entertainment and dancing at the Licensed Premises and the Stipulated Judgment remains in effect, with neither the Order or Stipulated Judgment having been modified or rescinded.^[fn.] The preponderance of the evidence establishes that the reasons and grounds for imposition of condition number two still exist and it is, in fact, a valid and reasonable condition. (Findings of Fact ¶¶ 1-9, 12-20.)

(Conclusions of Law, ¶¶ 4-5.) We agree with the these conclusions.

We have carefully reviewed the entire record, and considered arguments presented by both parties, and find that the Department's decision denying the Petition is supported by substantial evidence. We also find that appellant failed to rebut the evidence supporting the decision. Specifically, appellant failed to meet its burden of proof to establish that the grounds which necessitated the imposition of the condition no longer exist.

Furthermore, in its briefs, appellant fails to reference citations to the record in claiming error. We are presented only with appellant's opinion that the Department's decision is vague, lacks standing, and constitutes an abuse of discretion. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing

authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].)

In the instant matter, substantial evidence supports the Department's decision to deny the Petition. Appellant failed to demonstrate error and failed to demonstrate that the grounds which necessitated the imposition of the condition no longer exist.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

MCDINIS RESTAURANT CORPORATION
DBA: MCDINIS IRISH CANTINA
105 E 8TH ST
NATIONAL CITY, CA 91950-2222

ON-SALE GENERAL EATING PLACE -
LICENSE

SAN DIEGO DISTRICT OFFICE

File: 47-467454

Reg: 19089150

AB: 9869

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on June 4, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

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

IN THE MATTER OF THE PETITION OF:

**MCDINIS RESTAURANT CORPORATION
MCDINIS IRISH CANTINA
105 EAST 8TH STREET
NATIONAL CITY, CA 91950-2222**

**FOR THE MODIFICATION OF CONDITIONS ON
THE ON-SALE GENERAL EATING PLACE -
LICENSE**

SAN DIEGO DISTRICT OFFICE

File: 47-467454

Reg: 19089150

CERTIFICATE OF DECISION

**Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on February 20, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

RECEIVED

FEB 24 2020

**Alcoholic Beverage Control
Office of Legal Services**

Sacramento, California

Dated: February 24, 2020



**Matthew D. Botting
General Counsel**

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

IN THE MATTER OF THE PETITION OF:

McDinis Restaurant Corporation
Dbas: McDinis Irish Cantina
105 East 8th Street
National City, California 91950-2222

FOR THE MODIFICATION OF CONDITION ON
AN ON-SALE GENERAL EATING PLACE
LICENSE

Under the Alcoholic Beverage Control Act

} File: 47-467454
}
} Reg.: 19089150
}
} License Type: 47
}
} Word Count: 26,803
}
} Reporter:
} Shelia McQueen
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on October 29, 2019.

John Newton, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Benjamin Adler, corporate secretary for Petitioner, McDinis Restaurant Corporation, represented Petitioner. Charlton Adler, corporate president for Petitioner was also present. Petitioner was not represented by counsel.

The Petitioner seeks to remove condition number two (2) attached to its license as permitted by Business and Professions Code section 23803¹ on the basis that "[t]he prohibition of dancing due to absence of a dance floor [a]s required under approved N.C. 2010 Conditions of Approval [h]as been met."² (Exhibit 1.)

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

² At the beginning of the hearing the Petitioner withdrew its request to either modify, maintain or reserve condition number 3 (which provides "Live entertainment shall be permitted only on Thursdays, Fridays, and Saturdays until 12:00 Midnight,") stating its desire to leave condition number 3 to "remain as it is at this time," "to leave that condition alone, ... it is not in question." The Department had no objection thereto. The Petitioner sought only to remove condition number 2, which provides that "No dancing shall be permitted on the premises." The undersigned confirmed with the parties that the only issue to be decided by the undersigned, and

The Department investigated the Petitioner's request and denied it because the grounds that caused the condition(s) to be imposed still exist. Thereafter the Petitioner requested an administrative hearing.

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 29, 2019.

FINDINGS OF FACT

1. The Petitioner holds a type-47, on-sale general eating place license at the above-described location (the Licensed Premises). The Petitioner has held this type-47 on-sale general eating place license since August 22, 2008; resulting from a person-to-person transfer.
2. The original conditions imposed upon the license were signed by McDinis Inc. on April 3, 1987, by corporate officer T. Michael Arrellano. The original reasons for imposition of the conditions were pursuant to a protest against unconditional licensing by the Chief of Police of National City, and City Resolution Number 15,121.
3. Resolution Number 15,121, dated November 11, 1986, approved a conditional use permit (hereinafter referred to as CUP-1986) to allow additional hours for the sale of alcoholic beverages from midnight to 2:00 a.m., and to permit live entertainment Thursday through Saturday until 12 Midnight as an incidental use to a restaurant. The Resolution provided that the CUP-1986 "shall be subject to revocation if the Chief of Police determines that the extended hours and methods of operation have resulted in, or significantly contributed to a ten (10) percent increase in the demand for police services during the hours from 5:00 p.m. to 3:00 a.m. The demand for police services and police enforcement activities in this immediate area will be reviewed quarterly." (Exhibit 4.)
4. The conditions were carried forward with Benjamin Adler and Charlton Adler, corporate officers, executing a Petition for Conditional License on June 10, 2008, on behalf of McDinis Restaurant Corporation. (Exhibit 3.) The Petitioner acknowledged in its Petition for Conditional License, in part, the following:

"WHEREAS, the On-Sale General Eating Place License issued to the Petitioner-Corporation at the above-designated premises is presently subject to certain conditions

the parties agreed without objection, was whether condition number 2 (which states that no dancing shall be permitted on the premises) should be removed such that continuance of the license with removed or modified condition(s) and premises would be contrary to public welfare and morals.

pursuant to a protest against unconditional licensing by the Chief of Police of the City of National City; and,

WHEREAS, the [P]etitioner-[C]orporation requested modification of said conditions; and,

WHEREAS, said modifications have been approved by the National City Council and Chief of Police under City Council Resolution Number 15,121;

WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals;

NOW, THEREFORE, the undersigned petitioner(s) do/does hereby petition for a conditional license as follows, to-wit:

1. Alcoholic beverage sales shall be incidental to food service.
2. No dancing shall be permitted on the premises.
3. Live entertainment shall be permitted only on Thursdays, Fridays, and Saturdays until 12:00 Midnight.
4. Operation of the licensed premises shall at all times be in accord with National City Council Resolution Number 15,121, incorporated herein..."

5. The Petitioner's license has been the subject of the following discipline:

<u>Dates of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
9/27/09, 10/14/09, 10/15/09, 10/17/09	10072788	BP§23804 ³	POIC in lieu of 15-day susp. with 5 days stayed

The foregoing disciplinary matter is final. (Exhibit 2.)

6. On May 20, 2010, National City filed a nuisance abatement action against "Ben Adler, Charleton Adler, McDinis, Inc., Adler Howard Trust," et. al., for their failure to comply with the conditions of their CUP. The nuisance abatement action listed a higher than normal call for police response, involving numerous gang activities, violence and other matters that required police response at and around the Licensed Premises. On December 17, 2010, a Stipulated Judgment as to Complaint to Abate a Public Nuisance (hereinafter referred to as the Stipulated Judgment) was filed with the San Diego County Superior Court, settling the afore-mentioned abatement action, and providing that the Licensed Premises "will immediately cease to operate." However, the Stipulated Judgment would be stayed if the defendants/Petitioner met seven conditions, including,

³ For multiple violations under section 23804 of conditions 2 and 3 imposed upon the license.

but not limited to, (a) applied within 60 days for a new CUP, (b) in the interim the provisions of a 2009 CUP number 2009-09, would be followed, "except that no live entertainment of any kind will be allowed, including, but not limited to, production companies and disk jockeys; thus Condition 9 is not permitted"... (g) within 60 days from August 13, 2010, McDinis will re-apply to ABC for a type 47 license that does not allow for live entertainment." The Stipulated Judgement further provided that, "In the event that Defendants do not comply with any terms of this Stipulation, the City can proceed by Ex-Parte Application to enforce the Stipulated Judgment and immediately require the closure of the business operated by McDinis Restaurant Corporation." (Exhibit 8.)

7. On February 21, 2012 via Resolution Number 2012-49 the Petitioner obtained a new CUP-2010-33, which provided in part that it "authorize[d] an approximately 835 square-foot interior addition, live entertainment, and dancing from 6 p.m. to 1 a.m., Thursday through Sunday, and the construction of a 6-foot by 20-foot stage, with a 9-foot by 20-foot dance area for the live entertainment. Except as required by conditions of approval, all plans submitted for permits associated with the project shall conform to Exhibit A, Case File No. 2010-33 CUP, dated September 1, 2011." Resolution Number 2012-49 further provided that, "No live entertainment, dancing, or construction of any stage or dancing area may commence until the stipulated judgment has been rescinded or modified appropriately so as to allow for such activities." (Exhibit 11.) Resolution Number 2012-49 provided similar language to Resolution Number 15,121, that National City could seek revocation of CUP-2010-33 if there was a ten (10) percent increase in the demand for police services/calls for service at the Licensed Premises. The said Resolution further required the Planning Commission to review CUP 2010-33 one year from the date of its approval.

8. On March 4, 2013, an annual review of CUP-2010-33 was set. On June 17, 2013, after several hearing review continuances, the Planning Commission revoked CUP-2010-33. Petitioners appealed the revocation to the City Council, which appeal was considered and denied at a public hearing held before the City Council on August 20, 2013 with Resolution Number 2013-132. On September 3, 2013, Resolution Number 2013-132 was adopted, which held that the Planning Commission's revocation of CUP-2010-33 was supported by substantial evidence, including, but not limited to, that there was a 750 percent increase in police calls for service at the Licensed Premises involving violence and other condition violations of City Council Resolution 2012-49, occurring on various dates ranging between the calendar years 2012 and 2013. The City Council affirmed the Planning Commissions findings that the use authorized by CUP 2010-33 was exercised in a manner contrary to the conditions of approval, and in a manner detrimental to the public health, safety, and welfare. (Exhibit 10.)

9. On September 3, 2013, based on the 750 percent increase in police calls for service which exceeded the ten (10) percent limit, the City Attorney for National City sought an

Ex Parte Hearing to Reinstate Prohibition of Live Entertainment at the Licensed Premises based on the terms of the Stipulated Judgment (Exhibit 8) which was still in place. On September 12, 2013, a San Diego County Superior Court Judge issued an Order After Ex Parte Hearing to Reinstate Prohibition of Live Entertainment. (Exhibit 9.) Said Order enforced the existing Stipulated Judgment (which had been entered on December 17, 2010 and the Amended Stipulated Judgment entered March 27, 2012), and prohibited at the Licensed Premises all live entertainment, which included dancing⁴. As of the date of the hearing said Order continues to prohibit live entertainment and dancing at the Licensed Premises and the Stipulated Judgment remains in effect, both having not been rescinded or modified.

10. By letter dated September 7, 2018, Petitioner requested the Department remove condition number two upon its type-47 license (which provides, "No dancing shall be permitted on the premises") on the basis that "[t]he prohibition of dancing due to absence of a dance floor [a]s required under approved N.C. 2010 Conditions of Approval [h]as been met." (Exhibit 1.) The Petitioner further requested the Department to modify condition number 3 (which provides "Live entertainment shall be permitted only on Thursdays, Fridays, and Saturdays until 12:00 Midnight") to instead provide that "Live entertainment shall be permitted THURSDAY-SUNDAY until 2AM."⁵

11. On December 4, 2018, Department Licensing Representative II Maritza Gonzalez notified both the city of National City and the National City Police Department (National City PD) of the Petitioner's request to remove and modify the said conditions.

12. On January 10, 2019, Nicole Pedone, the Senior Assistant City Attorney with the City of National City, e-mailed LR Gonzalez advising the City Attorney's office received from the National City PD the Petitioner's request to modify or remove conditions on its license. Attorney Pedone advised LR Gonzalez that the City Attorney's Office objects to any modification or removal of the Petitioner's conditions upon its type-47 license with the Department and requests the Department deny the Petitioner's application to modify its conditions. Attorney Pedone informed LR Gonzalez that there is a valid court order

⁴ Exhibit 11 – Page two of Resolution Number 2012-49, provides in part, "No live entertainment, dancing or construction of any stage or dancing area may commence until the stipulated judgment has been rescinded or modified appropriately so as to allow for such activities."

⁵ By letter to the Department dated August 15, 2019, Petitioner requested to "Maintain (reserve) the existing conditions upon our license to wit: 3. LIVE ENTERTAINMENT shall be permitted only on THURSDAYS, FRIDAYS And [sic] SATURDAYS until 12:00 midnight. 4. Operation of the licensed premises shall at all times be in accord with National City Resolution Number 15,121, incorporated herein as Exhibit 1." Petitioner further requested "to modify (eliminate condition)#2 'NO dancing shall Be permitted on the premises.'" (Exhibit 1.)

prohibiting live entertainment at any time at the Licensed Premises, and that Petitioner's claim that a current condition exists which permits live entertainment is false, and any CUP Petitioner had was revoked. (Exhibit 6.)⁶

13. On January 30, 2019, Sergeant Walters with the Gang Enforcement Team of the National City PD e-mailed LR Gonzalez advising that the National City PD objects to the Petitioner's proposed condition: modification request, that over the years National City PD has had numerous calls for service regarding McDinis Restaurant, which calls have "covered shootings, fights, unruly customers, drunks walking the neighborhood, and several other quality of life issues for our community." Sergeant Walters further advised that "Mr. Adler has been uncooperative and very aggressive with our officers in the past, and that McDinis Restaurant Corporation's CUP for live entertainment was revoked with "a current court order prohibiting any type of live entertainment which includes dancing on the premises." (Exhibit 7.)

14. LR Gonzalez was assigned to and did thoroughly investigate the Petitioner's request to remove and modify its conditions. LR Gonzalez took a leave of absence and Supervising Agent in Charge (SAC) Ryan took over the investigation of Petitioner's requests. SAC Ryan appeared and testified at the hearing⁷. SAC Ryan explained that the ABC conditions imposed upon the Petitioner are effective at preventing the common types of issues which arise when a restaurant behaves as a night club. SAC Ryan testified that night clubs generally have type-48 licenses where minors are not permitted on the premises and there is no food service requirement. SAC Ryan said the typical problems arise when a restaurant has live entertainment and dancing, minors frequent the premises attempting to get alcoholic beverages, or the venue fails to serve food, and it becomes a night club, violating several statutes. The Department tailors its enforcement to the types of licenses held in each district. SAC Ryan began seeing problems with the Licensed Premises in 2008, when the Department started receiving complaints from the National City PD regarding fighting, stabbing and general disorderly activity at the Licensed Premises while the Petitioner had live entertainment and dancing. The Department continued to receive similar complaints through 2012 until ongoing litigation between the Petitioner and National City resulted in the Petitioner losing its ability to have live entertainment and dancing at the Licensed Premises.

⁶ LR Gonzalez thanked Attorney Pedone for her e-mail of January 10, 2019, and advised that Mr. Adler was in the office earlier that week, during which time LR Gonzalez had informed him she had not received any objections from any of the parties notified. (Exhibit 6.)

⁷ San Diego District Office SAC Ryan testified at the hearing about the Department's investigation, findings, and recommendation, in lieu of LR Gonzalez, who was on a personal leave of absence.

15. Based on SAC Ryan's knowledge of enforcing the ABC Act, the recommendation from both National City and National City PD with their supporting legal documents, and the fact the grounds causing imposition of the said conditions still exist, in addition to it appearing that the current conditions are contrary to local zoning and a court order, SAC Ryan issued a written report recommending the Petitioner's request be denied. The Report of Condition Modification Denial was signed by SAC Ryan on July 1, 2019. (Exhibit 5.) Ultimately, the Department formally denied the Petitioner's request because "the granting of your petition would render the continuance of your license contrary to public welfare and morals, within the meaning and intent of Article XX, Section 22 of the Constitution of the State of California and of the Alcoholic Beverage Control Act, Business and Professions Code Sections 23800-23801, in that the grounds which caused the imposition of the condition(s) continue to exist."⁸

16. Attorney Mitchell Dean, house counsel for the city of National City appeared and testified at the hearing. Attorney Dean is familiar with the Licensed Premises, having visited the location and litigated, on behalf of National City, at least five matters involving McDinis Restaurant Corporation. Attorney Dean testified the Petitioner does not have a current CUP with the city and that both the said Stipulated Judgment (Exhibit 8) and Order After Ex Parte Hearing to Reinstate Prohibition on Live Entertainment (Exhibit 9) remain in effect as of the date of the hearing. Attorney Dean confirmed that said Order enforced the Stipulated Judgment (which had been entered on December 17, 2010 and the Amended Stipulated Judgment entered March 27, 2012), and prohibited at the Licensed Premises all live entertainment, which included dancing. Attorney Dean reiterated the city of National City's recommendation the Department deny the Petitioner's request to remove and/or modify its conditions upon its type-47 ABC license. Attorney Dean maintained that in order for the Petitioner to have live entertainment or dancing at the Licensed Premises the Petitioner must obtain a new CUP and have said Order rescinded or modified appropriately so as to allow for such activities.

17. National City PD Lieutenant Seward appeared and testified at the hearing. Lt. Seward is familiar with the Licensed Premises because the National City PD has had numerous law enforcement problems with the Licensed Premises and had to respond to calls for service to the Licensed Premises and surrounding area when Petitioner was allowed to provide live entertainment and dancing. Lt. Seward testified that the National City PD would receive complaints of drunk in public, fights, and noise disturbances to the nearby residences due to the large crowds attending the Petitioner's live entertainment/dancing promotion nights on Friday, Saturday and Sundays. Petitioner's patrons, who were underaged, would leave the premises, go to the surrounding streets and their cars to drink alcoholic beverages, and throw their empty alcohol containers on the

⁸ The denial notification is in the Notice of Denial of Petition to Modify or Remove Condition(s) on the License, served upon the Petitioner by mail on or about August 7, 2019. (Exhibit 1.)

street, engage in fights and cause noise disturbances to residents. Lt. Seward spoke several times with Benjamin Adler about the law enforcement problems the National City PD was having relating to the Licensed Premises and their live entertainment/dancing promotion nights. Lt. Seward often saw Benjamin Adler "making rounds picking-up" alcohol containers, beer bottles or whiskey left behind by Petitioner's patrons attending the promotion nights. Lt. Seward said that when the Petitioner "was just serving food during the day time hours there were little or no issues" but "any time they did [live entertainment/dancing] promotions that brought the large crowds and problems" with patrons consuming alcohol around the surrounding area and fights "until the wee hours of the night." Lt. Seward recalled on one of the many occasions the police were called to the Licensed Premises seeing and arresting, for being drunk in public, two intoxicated men who were coming out of the Licensed Premises with one of the two men an employee of Petitioner's. Lt. Seward found the Licensed Premises to be a drain on police resources because when it had the live entertainment/dancing promotions on Friday, Saturday and Sundays the National City PD would have to have a police presence and post all available officers⁹ in the area so the said problems would "not get out of hand and even that wouldn't help because of the fights, the noise and the drunks" associated with the promotions. Lt. Seward noticed the law enforcement problems and demand for police services at the Licensed Premises "died off" when the Petitioner's CUP was revoked and the Petitioner no longer had live entertainment and dancing promotions. Lt. Seward confirmed that the National City PD recommends that "we maintain what we have now," that the Petitioner not be permitted dancing and live entertainment at the Licensed Premises.

(Petitioner's Witnesses)

18. Lawrence Frankel appeared and testified at the hearing. Mr. Frankel was a licensed California attorney since 1965, practicing both civil and criminal matters. He retired as an attorney in December of 2018. While licensed as a California attorney Mr. Frankel represented the Petitioner in 2013 relating to conditional use permit issues with the City Attorney for National City and its police department. Mr. Frankel recalls National City being adamant that the Petitioner would "not get live entertainment or dancing." He further recalled National City was concerned about a recent murder occurring across the street from the Licensed Premises and noise.

19. Mr. Frankel has visited the Licensed Premises the last few years in the evenings, during which time he has never seen any problems, including that of intoxicated persons, prostitution, solicitations, or "people throwing bottles." Mr. Frankel feels safe going to the premises, enough so that he would take his granddaughter there.

⁹ At the time Lt. Seward was working as a graveyard sergeant and had available to him only six police officers during the graveyard shift to assign for a police presence at the Licensed Premises during its said promotions, if they were not otherwise responding to other calls.

20. Manuel Alfonso Rodriguez III appeared and testified at the hearing. Mr. Rodriguez has been living at the Bayview Towers for approximately two and one-half years. Mr. Rodriguez estimated the Bayview Towers is approximately between 150 feet to 200 feet from the Licensed Premises. Bayview Towers is a high-rise building with approximately 200 units. Mr. Rodriguez' testimony was consistent with Lt. Seward and SAC Ryan's testimony in that since Mr. Rodriguez has been living at the Bayview Towers he has not noticed any police presence at the Licensed Premises, or law enforcement problems associated with the Licensed Premises. Mr. Rodriguez said he has noticed more law enforcement problems occurring at Bayview Towers. Mr. Rodriguez will go to the Licensed Premises after work to "wind-down," converse over a meal and have a drink. He considers the Licensed Premises as "a place to get away from it all" if some problems are occurring at Bayview Towers "once it's cooled down perhaps go home and turn in."

21. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution provides that the Department of Alcoholic Beverage Control has the power, in its discretion, to deny an application for an alcoholic beverage license if it determines for good cause that the granting of the license would be contrary to public welfare or morals.

2. Section 23800 provides that "[t]he department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges . . . [i]f grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions."

3. Section 23803 provides that "[t]he department, upon its own motion or upon the petition of a licensee[,] . . . if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification."

4. In this case, the burden of proof is on the Petitioner to establish that the reasons which caused imposition of the condition no longer exist. The reasons for those conditions are set forth in the Petition for Conditional License, signed by the Petitioner on June 10, 2008. (Exhibit 3.) The conditions were imposed because there was a protest against unconditional licensing by the National City Chief of Police. The Petition for Conditional License provides that the Petitioner's request for modification of conditions at that time was approved by the National City Council and Chief of Police under City Council Resolution Number 15,121. One of those conditions, condition number four,

provides that, "Operation of the licensed premises shall at all times be in accord with National City Council Resolution Number 15,121, incorporated herein as Exhibit 1." The said Petition for Conditional License additionally provides that issuance of an unrestricted license would be contrary to public welfare and morals. (Exhibit 3.)

5. The Petitioner presented no evidence that the reasons for imposition of its conditions no longer exist. In fact, the National City PD continues to protest any modification request by the Petitioner. The National City PD's current opposition to Petitioner's request to remove or modify its ABC conditions equates to the National City PD's continued protest against unconditional licensing. There was evidence the Petitioner was in violation of various resolutions, including, but not limited to, Resolution Numbers 15,121 and 2012-49. Specifically, the record established that operation of the Licensed Premises with live entertainment and dancing caused repeated law enforcement problems, including demands for police services. A 750 percent increase in police calls for service at the Licensed Premises involving violence and other condition violations of City Council Resolutions 15,121 and 2012-49, occurred on various dates ranging between the calendar years 2012 and 2013. The evidence revealed that once the conditions of live entertainment and dancing were removed there were no similar law enforcement problems at the Licensed Premises. Furthermore, the record established that on September 12, 2013, a San Diego County Superior Court Judge issued an Order After Ex Parte Hearing to Reinstate Prohibition of Live Entertainment (Exhibit 9) with said Order enforcing the existing Stipulated Judgment (Exhibit 8), and prohibited at the Licensed Premises all live entertainment, which included dancing. As of the date of the hearing said Order continues to prohibit live entertainment and dancing at the Licensed Premises and the Stipulated Judgment remains in effect, with neither the Order or Stipulated Judgment having been modified or rescinded.¹⁰ The preponderance of the evidence establishes that the reasons and grounds for imposition of condition number two still exist and it is, in fact, a valid and reasonable condition. (Findings of Fact ¶¶ 1-9, 12-20.)

6. Granting the Petitioner's request to remove condition number two as provided in the Petition for Conditional License on the Petitioner's on-sale general eating place license would be contrary to public welfare and morals.

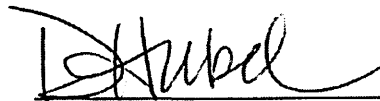
7. Except as set forth in this decision, all other contentions of the parties lack merit.

¹⁰ The Department of Alcoholic Beverage Control issues licenses for alcoholic beverages, not for live entertainment or dancing. The Department can issue alcoholic beverage licenses subject to certain conditions, such as no dancing, or limiting other related activity, and the conditions are tied to the license. National City's restrictions on use of the property are binding on the Licensee, independent of whatever conditions may also be on the type-47 license.

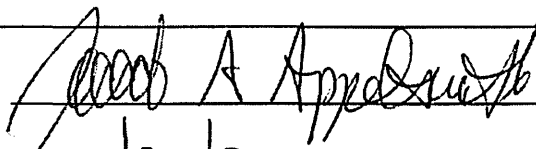
ORDER

The Petitioner's request to remove condition number two is hereby denied.

Dated: December 13, 2019



D. Huebel
Administrative Law Judge

☒	Adopt
☐	Non-Adopt: _____
By:	
Date:	2/20/20