

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

AB-9982

File: 48-393337; Reg: 22092250

JERLOU CORP.,
dba Thrusters Lounge
4633 Mission Boulevard
San Diego, CA 92109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Hubel

Appeals Board Hearing: December 8, 2023
Videoconference

ISSUED DECEMBER 11, 2023

Appearances: *Appellant:* Matthew Friedrichs, of Winship & Friedrichs, A
Professional Corporation, as counsel for Jerlou Corp.,

Respondent: Kellie Brady, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Jerlou Corp., doing business as Thrusters Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ denying its petition to expand its license pursuant to Business and Professions Code² section 24072 and California Code of Regulations Title 4, Division 1, Rule 64.2.

¹ The decision of the Department, dated July 11, 2023, is set forth in the appendix.

² All statutory references are to the California Business and Professions Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

Appellant holds an on-sale general public premises license, which prohibits anyone under 21 years old to enter the licensed premises. Appellant acquired the license in late 2002. However, the location of the licensed premises has held a license since 1980.

The licensed premises is a cocktail lounge in a single-story building on a major thoroughfare in a mixed commercial and residential use area of Pacific Beach. The licensed premises contains a fixed bar, lounge area, restrooms, and storage room.

Appellant petitioned to expand its license in 2020, which the Department denied. Appellant requested an administrative hearing following the Department's denial of its petition.

At the administrative hearing held on April 18, 2023, oral testimony, documentary evidence, and evidence by oral stipulation was received. Department Licensing Representative II (LR) Susan Isenman, San Diego Police Department (SDPD) Detective Andrea Wood, Jeffrey Cairncross from Cairncross Property Management, and Department Supervising Agent in Charge (SAC) Melissa Ryan testified on behalf of the Department. Nick Zanoni, owner of the licensed premises, testified on appellant's behalf.

Evidence offered at the administrative hearing established that the original licensed premises included an uncovered outdoor patio at the rear of the premises. On September 13, 2010, the licensee notified the Department of a premises remodel, maintaining the footprint, but relocating the restrooms and replacing the outdoor patio with a storage room because noise on the patio became an issue. Appellant's current Licensed Premises Diagram and Planned Operation Form (ABC-257) indicates operating hours of 11:00 a.m.

to 2:00 a.m., recorded music, amplified music, live entertainment, and no patio. (Exhibit 5.) Parking is available at the rear of the licensed premises with eight parking spaces including a disabled parking space.

Shortly before the removal of the patio, on or about July 29, 2009, Mr. Zaroni executed a Petition for Conditional License, which imposed three (3) conditions on the license: 1) Sales, service, and consumption of alcohol shall not be permitted in the patio area after 11 p.m. Sunday through Wednesday, and 12 midnight Thursday through Saturday; 2) licensed premises shall keep the areas adjacent to the licensed premises which are under its control litter free, and; 3) prevent audible noise beyond the area under the licensed premises' control. (Exh. D-2.)

During the Covid-19 pandemic, appellant applied for a Covid-19 Temporary Catering Authorization (TCA) permit, which was approved on May 21, 2020, for use in the rear/side patio of the premises. Appellant created a temporary outdoor patio, measuring 18 feet by 100 feet which covered some of the parking spaces, and was surrounded by a wood, open-slatted fenced-in area ("Covid TCA Patio").

On September 29, 2020, Mr. Zaroni submitted a letter to the Department requesting to expand the licensed premises and submitted a Change in Licensee Information/Licensed Premises (ABC-244), a new ABC-257, and Supplemental Diagram (ABC-253). Mr. Zaroni also included black and white photographs of the current exterior building of the premises and a photographic rendering of the proposed changes. The expansion request sought to expand the rear patio area to include an outdoor deck and to add a rooftop open air deck, which would be located on the roof above the licensed premises and "Biggies Burgers," a hamburger restaurant located in the same single-story

building directly adjacent to the licensed premises.

The proposed outdoor/deck/patio and rooftop deck would be accessible to patrons from the licensed premises and Biggies Burgers, although Biggies Burgers does not have an alcoholic beverage license. The rendering illustrates a metal pergola over a portion of the left side of the rooftop deck and portable umbrellas set up on the right side of the open-air deck. The portion of the deck with the metal pergola was part of the proposed expansion request to be licensed, while the portion with the portable umbrellas was not. The rendering is taken from across the street of the licensed premises, although the five-unit residential apartment building located at the back of the licensed premises is not depicted in the rendering.

LR Isenman investigated appellant's request. On October 29, 2020, she emailed the City of San Diego Planning Department to confirm whether the expansion request would have any impact or effect on zoning and if any permits were required. She received no response. LR Isenman also notified SDPD of appellant's expansion request on October 29, 2020. SDPD Detective Wood notified the Department of SDPD's objection on November 19, 2020.

SDPD's objection to expansion of the licensed premises was based on the grounds that: 1) the licensed premises is located in census tract 79.05 which had a high crime rate of 534.7 percent³ and an alcohol crime rate of 3,000.5 percent; 2) the already heavy law enforcement burden⁴ in the area of the licensed premises; 3) the proposed expansion

³ Any crime rate at 120 percent or above is considered high.

⁴ SDPD provided substantial statistical data as evidence the licensed premises was in a high crime reporting district/census tract. (Findings of Fact, ¶ 17.)

would increase the law enforcement burden, and; 4) the licensed premises is located in very close proximity to residences such that a rooftop deck would interfere with the quiet enjoyment of the property of nearby residences. (Exh. D9.)

On November 2, 2020, LR Isenman visited the licensed premises and verified there are no churches or hospitals within the immediate vicinity, and there are no schools, public playgrounds, or nonprofit youth facilities within 600 feet. LR Isenman determined there were 21 residents within 100 feet of the licensed premises. The closest residents are approximately four (4) feet from the rear of the licensed premises with a small walkway in between. LR Isenman mailed letters to each resident within 100 feet of the licensed premises advising them of the premises expansion request. She received four (4) residential objections, which included a main complaint of loud noise, a concern regarding fights occurring in the area, the close proximity of the licensed premises to residents, and parking problems.

Department agents visited the licensed premises several times in 2021 and did not observe disorderly activity or violations. On April 15, 2021 and April 23, 2021, Department agents visited the licensed premises and advised management and the owner to lower the volume of recorded music on the patio and cease recorded music emanating from the licensed premises because of complaints from neighbors about the noise. LR Isenman visited the licensed premises on February 10, 2022 and saw the Covid TCA Patio at the rear of the premises, which was located adjacent to the residential apartment building with no separation factors. LR Isenman saw that several windows from the second floor of the residential building faced and looked onto the outdoor patio area. (Exhs. D6a and D6b.)

While the licensed premises was operating under its TCA permit, the Department received complaints from nearby residents about noise emanating from the Covid TCA Patio. The Department investigated the complaints and determined them to be valid. SAC Ryan verified the residential complaints and other problems associated with the Covid TCA Patio.⁵ SAC Ryan issued a letter to appellant on March 17, 2022 advising that its TCA permit was cancelled due to said complaints as well as an SDPD report from 2021 that it received seven (7) calls for service at the licensed premises for disturbances and a Penal Code section 242 battery, which is considered a violent crime. The cancellation was made effective on May 31, 2022 to give appellant sufficient time to make arrangements for the closure of the Covid TCA Patio. (Exh. 12.)

Jeffrey Cairncross appeared and testified at the hearing. Mr. Cairncross owns a property management company which has been managing the apartment building immediately adjacent to the licensed premises for 20 years. (Exhibits D6a and D6b.) Mr. Cairncross testified that:

[After the installation of] the Licensed Premises' COVID TCA patio it became a circus of loud noise and music emanating from the Licensed Premises, with a line of patrons around the block. During the latter half of 2020 and into 2021 and 2022, Mr. Cairncross said he received consistent complaints from his tenants about the noise coming from the Licensed Premises, with the noise complaints beginning Friday and throughout the

⁵ SAC Ryan testified at the hearing:

The Department receives a lot of complaints from the community and law enforcement regarding that area because it is highly concentrated with bars and restaurants in a small geographical area, and tends to attract a youthful college-age-crowd that walks from place to place, with a lot of over-consumption of alcohol, underaged drinking, fights, medical calls and recently an increase in violent crimes. The Department receives noise complaints from residences specifically relating to the Licensed Premises.

(Findings of Fact, ¶ 18.)

week. Mr. Cairncross stood in the alley several nights observing the disturbances emanating from the Licensed Premises, which he described as unreasonable, unruly and out of control. Mr. Cairncross communicated the noise complaints to Mr. Zanoni to no avail. Mr. Zanoni suggested Mr. Cairncross install new windows in the apartment building, but Mr. Cairncross had already installed new windows and the noise from the premises was still a problem. Mr. Zanoni suggested removing one of the tenants via an eviction and replacing him with one of Mr. Zanoni's employees. Mr. Cairncross rejected that suggestion outright because his tenant had been there for 10 years and he never had a problem with him. Mr. Cairncross finds the tenant is a very easy going guy, and considers him a perfect tenant. Having seen the Petitioner's proposed premises expansion, in Mr. Cairncross' opinion, as the property manager of the five-unit apartment complex adjacent to the Licensed Premises, any expansion, whether a rooftop deck or patio, would cause additional problems for his tenants.

(Findings of Fact (FF), ¶ 20.)

On March 15, 2023, LR Isenman visited the licensed premises at approximately 7:00 p.m. when she observed a rear patio set up with tables and chairs, hanging lights, which were on, and a big screen television on one side of the patio. LR Isenman took two photographs of the patio (exhs. D8a and D8b). During that visit it was raining and she did not see any patrons on the rear patio. She noticed that the expanded Covid TCA Patio that had been there on February 10, 2022 was removed, so that all the parking spaces in the rear were accessible for parking. The current rear patio, while still at the rear of the licensed premises, did not extend as close to the residential apartment building as the Covid TCA Patio. The patio she observed on March 15, 2023 left a little more space between the licensed premises and the residential apartment building.

On April 5, 2023, LR Isenman visited the licensed premises at approximately 7:45 p.m. and observed the same rear patio setup with chairs, table, and large screen television. However, the lights were off and a sign was posted on the door to the patio stating, "Patio Closed." The door was propped open to the patio, which she was able to

access. She did not observe any patrons in the rear patio on the visit. Based on the Department investigation, the objections, noise complaints from nearby residents, and the close proximity of residents, LR Isenman determined the proposed premises expansion would increase noise and interfere with the quiet enjoyment of nearby residents, especially those immediately adjacent to the licensed premises.

The Department formally denied appellant's request because the granting of the petition would render the continuance of appellant's 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 23958, 23958.4, 24072, and California Code of Regulations Title 4, Division 1, Rule 61.4 and Rule 64.2.

On May 31, 2023, the administrative law judge (ALJ) issued a proposed decision denying appellant's request to expand the licensed premises because it "failed to meet its burden. Based on the preponderance of the evidence, granting [appellant's] request ... would be contrary to public welfare and morals." (Conclusions of Law (COL), ¶ 9.) The Department adopted the ALJ's proposed decision on July 7, 2023, and issued a certificate of decision four (4) days later.

Appellant filed a timely appeal contending that: 1) the Department did not proceed in a manner required by law; 2) the Department's decision is not supported by the findings, and; 3) the Department's findings are not supported by substantial evidence. The Board will discuss these issues in reverse order.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant argues that the Department's findings are not supported by substantial evidence. (AOB, at pp. 8-9.) Appellant points to its discipline-free history and the fact that the conditions regarding crime and proximity of residences to the licensed premises are the same or similar to the conditions that existed when the license was originally issued in 1980. (*Id.* at p. 8.) Appellant contends that issues with its petition only arose because of the Covid TCA Patio, which should not have had any bearing on its expansion petition. (*Id.* at p. 9.)

Here, the Department found that granting appellant's petition would be contrary to public welfare and morals. (COL ¶ 9.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance,

which is 'reasonable in nature, credible and of solid value.' ” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department found:

5. At the time the type-48 license issued, the Licensed Premises or its parking lot was located within 100 feet of residences. Conditions were imposed, in part, based on the existence of these rule 61.4 residents and those conditions were designed to protect the nearby residents' quiet enjoyment of their property. There are 21 of those residences which still exist. Some of these residents are already adversely affected by the operations of the Licensed Premises. The closest residents are located at the rear of and adjacent to the Licensed Premises. The Department mailed notices to the 61.4 residences regarding Petitioner's proposed premises expansion request and received four objections therefrom. The main complaint from nearby residents was the loud noise emanating from the Licensed Premises. The preponderance of the evidence established that the proposed premises expansion would interfere with the quiet enjoyment of nearby residents because of the proposed premises' close proximity to nearby residents and the fact the proposed rooftop deck and outdoor patio's open-air design would inevitably allow sound to travel to nearby residents; no matter the sound mitigation efforts of positioning audio-visual equipment or sound absorbing furniture and carpet in the open-air areas. Furthermore, the Petitioner had a test run with its outdoor COVID TCA permitted patio. The evidence established that even with that patio there were overwhelming problems with the interference of nearby residents' quiet enjoyment of their property. While the Petitioner was exercising its privileges under its TCA permit, the Department received multiple noise complaints from nearby residents about noise emanating from the Petitioner's COVID TCA patio, which the Department verified. Department Agents had to notify the Licensee and its management on more than one occasion to lower the recorded music on the patio and cease allowing recorded music from emanating from the Licensed Premises because of complaints from neighbors about the noise from the premises. The outdoor patio became such a nuisance the Department had to cancel the Petitioner/Licensee's TCA permit. Even though the Petitioner's new proposed rear outdoor patio would not be situated as near to the closest residential apartment building as its COVID TCA patio, the proposed premises expansion areas would still be close enough that the noise emanating from the operation of the open-air rooftop deck and outdoor patio would travel to nearby residents to interfere with their quiet enjoyment of their properties. Several windows from the second floor of the residential apartment building would still face and look out onto the

rooftop deck and outdoor patio of Licensed Premises, should the expansion be approved. The preponderance of the evidence established that any expansion of the Licensed Premises would cause an increase in the noise and disturb the quiet enjoyment of nearby residents. (Findings of Fact 111, 3-6, 9, 11-13, 16-19.)

6. Other reasons why conditions were imposed upon the Licensed Premises is reflected in Petitioner's "WHEREAS" clauses in its Petition for Conditional license, including, but not limited to, the San Diego PD's protest of issuance of the type-48 license. That protest dealt with the proposed operation of the applied for premises, the fact the premises is located in an area in which there is a significant law enforcement problem, that issuance of the subject license without conditions would not serve public convenience or necessity, and that issuance of an unrestricted license would be contrary to public welfare or morals.

7. With respect to the first prong of section 23958.4, it provides that a reporting district is high crime (and, therefore, over-concentrated) if it has a 20 percent greater number of reported crimes, as defined, than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency. In the present case, the San Diego PD provided statistical data within the meaning of Section 23958.4. Based on the evidence presented, the area in which the Premises is located is still considered a high crime reporting district/census tract. Great weight is given to the opinion of local law enforcement. Here, there was overwhelming evidence presented by San Diego PD Detective Wood that the premises expansion would add to the already heavy law enforcement and public safety burden that exists in census tract 79.05, and at the Licensed Premises, thereby causing problems for the existing strained resources of the San Diego PD. The San Diego PD already added resources in the Pacific Beach area where the Licensed Premises is located and is struggling to keep up with the high public safety burden surrounding the Licensed Premises. (Findings of Fact 1116 and 17.)

8. Detective Wood credibly maintained that granting the Petitioner's request would aggravate existing law enforcement problems in light of the high number of alcohol-related crimes in that census tract/reporting district and the upward trend in violent disturbance calls in the last few years at the Licensed Premises. (Findings of Fact 117.)

(COL, ¶¶ 5-8.)

As noted above, “we are bound to construe the evidence in the light most favorable to the ALJ's decision” and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on the extensive documentary exhibits offered by appellant and the Department, as well as the testimony of LR Insenman, Detective Wood, Mr. Cairncross, and SAC Ryan. (FF, ¶¶ 1, 3-6, 9, 11-13, and 16-19.) The Department especially gave “[g]reat weight ... to the opinion of local law enforcement” and found that Detective Wood “credibly maintained that granting the Petitioner’s request would aggravate existing law enforcement problems in light of the high number of alcohol-related crimes in that census tract/reporting district and the upward trend in violent disturbance calls in the last few year at the Licensed Premises.” (COL, ¶¶ 7-8.) Although Mr. Zaroni testified, and the Department considered that testimony, the Department clearly did not afford Mr. Zaroni’s testimony with the same weight.

The Department is entitled to rely on an ALJ’s determination of witness credibility and the weight afforded to such testimony. (*People v. Burton* (1958) 162 Cal.App.2d 790, 792 [328 P.2d 492, 493] [“[It was for the trier of the facts to pass upon the credibility of the witnesses and the weight to be accorded the evidence.”].) The Board sees no error with the Department’s findings based on the exhibits in the record and the testimony given at the hearing. The evidence in the record is “reasonable in nature, credible and of solid value,” and the Board must defer to the Department’s interpretations of that evidence. (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

II

DEPARTMENT'S FINDINGS

Appellant contends the Department's decision is not supported by the findings because appellant's "proposed expansion details were mischaracterized and/or not fully disclosed to the protestants of record" (AOB, at p. 7.) Appellant argues that the Department's decision "consistently, overwhelmingly, and mistakenly relied on the Department's false premise that Petitioner was requesting that the [Covid TCA Patio] be permanently licensed." (*Id.* at p. 3.) Appellant continues that the residential objections were based on that false premise, and that the crime statistics do not support the findings. (*Id.* at pp. 5-8.)

As noted above, the crime statistics appellant cites constitute substantial evidence supporting the Department's findings. Although it is possible for a reasonable person to look at those same statistics and afford them less weight than the Department, the Board has no such authority. (*Southland, supra*, 103 Cal.App.4th at 1094.) In fact, the Board is expressly prohibited from looking at the same evidence in order to second-guess the Department and reach a different result. (*Ibid.*)

Further, a review of the record does not support appellant's contention that the Department erroneously treated appellant's petition to permanently license its Covid TCA Patio. The Department expressly notes that "[e]ven though the Petitioner's **new proposed rear outdoor patio would not be situated as near to the closest residential apartment building as its COVID TCA patio**, the proposed premises expansion areas would still be close enough that the noise emanating from the operation of the open-air rooftop deck and outdoor patio would travel to nearby residents to interfere

with their quiet enjoyment of their properties.” (COL, ¶ 5 [emphasis added].) The Department did, however, consider appellant’s Covid TCA Patio as a “test run” for the proposed rear expansion. (*Ibid.*) The Department noted that, “even with [the Covid TCA Patio] there were overwhelming problems with the interference of nearby residents’ quiet enjoyment of their property” which resulted in “multiple noise complaints ... which the Department verified.” (*Ibid.*) The Board sees no error with the Department consideration of the noise issues that occurred while appellant’s Covid TCA Patio was operational, as it is reasonable to assume that at least some (if not all) of those issues would persist in any open-air patio in the rear of the licensed premises.

For the above reasons, the Department’s findings must stand.

III

SECTION 23958

Appellant contends that the Department did not do a “thorough investigation” of its petition. (Appellant’s Opening Brief (AOB), at pp. 1-3.) Specifically, appellant contends the Department failed to conduct a thorough investigation because:

The Department simply received objections from the San Diego Police Department and a few residents, without fully evaluating the Petitioner’s actual proposal and willingness to adapt to make sure an expansion would not cause any issues.

(*Id.* at p. 2.)

The Department relied on issues caused by the [Covid TCA Patio], despite the fact that Petitioner knew the Covid Patio was “not sustainable.”

(*Ibid.*)

[The Department ignored appellant’s] attempt to clarify his expansion request and make changes so the expansion would not create issues with residents

(*Id.* at p. 3.)

Section 23958 requires the Department to conduct a “thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license ... and shall investigate all matters connected therewith which may affect the public welfare and morals.” (Bus. & Prof. Code, § 23958.) The Department contends that appellant’s claim that it did not conduct a thorough investigation is not supported by the record. (Department’s Reply Brief, at pp. 10-11.) The Department argues that LR Insenman conducted a “thorough and complete” investigation by: 1) notifying “the residents within 100 feet of the premises and the three original protestants from when the license first issued to the appellant”; 2) contacting the SDPD, and; 3) “personally visiting the premises, taking photographs, analyzing calls for service and crime statistics related to the premise, reviewing the current license file, and communicating with he objectors.” (*Id.* at p. 10.) The Department further contends “appellant never submitted any modification or amendment to his petition.” (*Id.* at p. 11.)

A review of the record supports the thoroughness of the Department’s investigation. LR Insenman attempted to contact the San Diego city planning department, contacted SDPD, and sent letters to all residents within 100 feet of the licensed premises, as well as original protestants of the license. (FF, at ¶¶ 6-10.) LR Insenman and Department agents visited the licensed premises several times in connection to appellant’s expansion petition. (*Id.* at ¶¶ 10-14.)

Further, there is nothing in the record showing that appellant attempted to make any modifications to its petition in order to appease the Department or nearby residents, although there is evidence that Mr. Zanoni was willing to do so. The Department

expressly considered Mr. Zanoni’s testimony that, “the proposed outdoor ground-level patio would be further from the closest residential apartment building than the COVID TCA patio,” and that appellant “would be amenable to limiting the operating hours on the rooftop deck and patio.” (FF, at ¶ 20.) The Department also noted emails between Mr. Zanoni and LR Insenman where Mr. Zanoni proposed several additional concessions to limit the effect of noise on nearby residents. (*Ibid.*) The fact that the Department rejected Mr. Zanoni’s concessions, whether explicitly or impliedly, does not mean that it did not conduct a thorough investigation as a matter of law. Appellant’s argument, is therefore, rejected.

ORDER

The decision of the Department is affirmed.⁶

SUSAN BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶ 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.

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.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

IN THE MATTER OF THE APPEAL BY:

JERLOU CORP.
DBA: THRUSTERS LOUNGE
4633 MISSION BLVD
SAN DIEGO, CA 92109

On-Sale General Public Premises - LICENSE

SAN DIEGO DISTRICT OFFICE

File: 48-393337

Reg:

AB: 9982

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 September 28, 2023, 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:

JERLOU CORP.
THRUSTERS LOUNGE
4633 MISSION BOULEVARD
SAN DIEGO, CA 92109

FOR THE PREMISES EXPANSION OF THE
LICENSED AREA OF THE ON-SALE GENERAL
PUBLIC PREMISES - LICENSE



SAN DIEGO DISTRICT OFFICE

File: 48-393337

Reg: 22092250

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 July 7, 2023. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

Sacramento, California

Dated: July 11, 2023

RECEIVED

JUL 11 2023

Alcoholic Beverage Control
Office of Legal Services

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE PETITION OF:

Jerlou Corp.	}	File: 48-393337
Db: Thrusters Lounge	}	
4633 Mission Boulevard	}	Reg.: 22092250
San Diego, California 92109	}	
	}	License Type: 48
FOR THE PREMISES EXPANSION	}	
OF THE LICENSED AREA OF THE	}	Word Count: 37,289
ON-SALE GENERAL PUBLIC	}	
PREMISES LICENSE	}	Kennedy Court Reporter:
	}	Ashley Sanchez, Court Reporter
	}	Will Morrison & Jennifer Castro,
	}	Video Hosts
	}	
Under the Alcoholic Beverage Control Act	}	<u>PROPOSED DECISION</u>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference, on April 18, 2023.

Kellie Brady, Department Attorney III, represented the Department of Alcoholic Beverage Control (the Department).

Matthew Friedrichs, attorney-at-law, represented Petitioner, Jerlou Corp. Nick Zaroni, president of Jerlou Corp., was present.

The Petitioner seeks to expand its license pursuant to Business and Professions Code section 24072¹ and California Code of Regulations Title 4, Division 1, Rule 64.2. (Exhibit D1.)

The Department denied the Petitioner's request, after which the Petitioner requested a 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 April 18, 2023.

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

FINDINGS OF FACT

1. The Petitioner holds a type 48, on-sale general public premises license at the above-described location (the Licensed Premises).² The type-48 license prohibits anyone under the age of 21 to enter the Licensed Premises. The Licensed Premises is a cocktail lounge located in a single-story building on a major thoroughfare in a mixed commercial and residential use area of Pacific Beach. The Licensed Premises measures approximately 16 feet by 99 feet, and contains a fixed bar, lounge area, restrooms and storage room. (Exhibit D5 – ABC-257 dated July 15, 2010.) The original Licensed Premises included an uncovered, outdoor patio at the rear of the premises, measuring approximately 10 feet by 34 feet, as reflected in the ABC-257 dated August 10, 2002. (Exhibit D4.) On September 13, 2010, the Licensee, through its president Nick Zanoni, notified the Department of a premises remodel, maintaining the footprint, but relocating the restrooms and replacing the outdoor patio with a storage room, because noise on the patio became an issue, filing a revised ABC-257 signed July 15, 2010. (Exhibits D3, D5 and D7.) That most current ABC-257 indicates a planned operation for operating hours of 11:00 a.m. to 2:00 a.m., recorded music, amplified music, live entertainment, and no patio. (Exhibit D5.) Parking is available at the rear of the Licensed Premises for patrons with eight parking spaces including a disabled parking space.

2. The location of the Licensed Premises has been licensed with a type-48 on-sale general public premises license since November 25, 1980. There is no history of discipline against the license at issue.

3. On or about July 29, 2009, the Petitioner's corporate officer, Nick Zanoni, executed a Petition for Conditional License, which imposed three conditions on the license. The Petitioner acknowledged in the Petition for Conditional License, in part, the following:

WHEREAS, protests were previously filed against the issuance of the subject license; and,

WHEREAS, the San Diego Police Department previously protested the issuance of the subject license; and,

WHEREAS, the protest dealt with the proposed operation of the applied for premises; and,

WHEREAS, the proposed premises and/or parking lot operated in conjunction therewith are located within 100 feet of residence(s); and,

² There was no evidence presented as to the date the type-48 license was originally issued to the Licensee/Petitioner, only that the type-48 license was applied for in or around October of 2002.

WHEREAS, the issuance of the subject license without the below described conditions would interfere with the quiet enjoyment of the property by nearby residents and constitute grounds for denial of the application under the provisions of Rule 61.4, Chapter 1, Title 4 of the California Code of Regulations; and,

WHEREAS, the premises to be licensed is located in an area in which there is a significant law enforcement problem; and,

WHEREAS, the issuance of the subject license without conditions would not serve public convenience or necessity; and,

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

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

1. Sales, service and consumption of alcoholic beverages shall be permitted in the patio area no later than 11 p.m. Sunday through Wednesday, and 12 midnight Thursday through Saturday.
2. Petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control, as depicted on the ABC-253 dated May 10, 2009.
3. No noise shall be audible beyond the area under the control of the licensee so as not to disturb nearby residents. (Exhibit D2.)
4. During the COVID-19 Pandemic the Licensee applied for a COVID-19 Temporary Catering Authorization (TCA) permit, which was subsequently approved on May 21, 2020, for use in the rear/side patio of the premises. The Licensee had created an outdoor patio, measuring 18 feet by 100 feet which included consuming some of the parking spaces for the patio, surrounded by a wood, open-slatted fenced-in area (hereinafter referred to as the COVID TCA patio). (Exhibits D6a and D6b.) The COVID TCA patio was right next to a residential apartment building that has five units with no separation factors. While the Licensed Premises was operating under its TCA permit the Department received complaints from nearby residents about noise emanating from the COVID TCA patio. The Department investigated the complaints and determined them to be valid. Supervising Agent in Charge (SAC) Ryan verified the residential complaints and other problems associated with the Licensed Premises' COVID TCA patio. On March 17, 2022, SAC Ryan issued a letter to the Licensee advising that its TCA permit was cancelled due to said complaints as well as the San Diego Police Department's report that in 2021 it received seven (7) calls for service at the Licensed Premises for disturbances and a Penal Code section 242 battery, which is considered a violent crime.

SAC Ryan made the cancellation effective May 31, 2022, to give the Licensee sufficient time to make arrangements for the closure of the COVID TCA patio. (Exhibit D12.)

5. On September 29, 2020, Petitioner's president, Nick Zaroni submitted to the Department a letter requesting to expand the Licensed Premises, and attached an ABC-244 Change in Licensee Information/Licensed Premises, ABC-257, and ABC-253, signed September 28, 2020. Mr. Zaroni also included black and white photographs of the exterior building of the premises at that time and a photographic rendering of the proposed changes. The premises expansion request was to expand the rear patio area to include an outdoor deck and to add a rooftop open air deck, which would be located on the roof above the Licensed Premises and Biggies Burgers, a hamburger restaurant which is located in the same single-story building and directly adjacent to the Licensed Premises. The outdoor deck/patio and rooftop deck would be accessible to patrons from the Licensed Premises and Biggies Burgers (Exhibit D3, pp 8-11.) Biggies Burgers does not have an alcoholic beverage license. The photographic rendering of the rooftop open air deck illustrates there to be a metal pergola over a portion of the left side of the rooftop deck and portable umbrellas set up on the right side of the open-air deck that has no pergola.³ (Please see exhibit D3, page 11, bottom left photograph titled "Proposed.") The photographic rendering is taken from across the street looking at the front of the Licensed Premises. There is a five-unit residential apartment building located at the back or rear of the lot of the Licensed Premises, which is not depicted in this photograph.

6. Department Licensing Representative Isenman (hereinafter LR Isenman) investigated the Petitioner's request and issued a written report recommending it be denied in April of 2022.⁴ LR Isenman submitted a Supplemental Denial Report on April 10, 2023, which was approved by her supervisor. (Exhibits D3, D7.) On February 15, 2023, the Department formally denied the Petitioner's request because the granting of the petition would render the continuance of Petitioner's 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 23958, 23958.4, 24072, and California Code of Regulations Title 4, Division 1, Rule 61.4⁵ and Rule 64.2.⁶ The factors the Department considered

³ LR Isenman pointed out that the photographic rendering depicts a pergola-type structure on the roof above the Licensed Premises and Biggies Burgers, which is the area of the requested premises expansion on the rooftop. However, the area depicted to the right thereof with umbrellas is not part of the proposed expansion request and therefore if the expansion request was approved, that area would not be part of the area to be licensed.

⁴ LR Isenman testified at the hearing about her investigation, findings, and recommendation.

⁵ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

⁶ The denial notification was contained in the Notice of Denial of Premises Expansion and First Amended Notice of Denial of Premises Expansion with First Amended Statement of Issues

during the original application in 2002 for the type-48 license included, but was not limited to, the protest by the San Diego Police Department (PD), the rule 61.4 residents within 100 feet of the Licensed Premises, protests of nearby residents, high crime in census tract 79.05, and the significant law enforcement problem.

7. On October 29, 2020, LR Isenman emailed the City of San Diego Planning Department to confirm whether the expansion request would have any impact or effect on zoning and if any permits were required. She received no response therefrom.

8. On November 2, 2020, LR Isenman visited the Licensed Premises and verified there are no churches or hospitals within the immediate vicinity of the Premises, and there are no schools, public playgrounds or nonprofit youth facilities within 600 feet of the Premises.⁷

9. On the visit of November 2, 2020, LR Isenman also determined there to be 21 residents within 100 feet of the Licensed Premises that still exist. The closest residents are located at the rear of the Licensed Premises, and which are approximately four (4) feet from the Licensed Premises with a small walkway in between the Licensed Premises and residential building. LR Isenman mailed ABC-205 letters to the 61.4 residents advising them of the premises expansion request. She received four (4) residential objections. The grounds for objection included the main complaint of loud noise emanating from the Licensed Premises, including noise from its patrons and music, another concern regarding fights occurring in the area, the close proximity to residents and parking problems.

10. On November 3, 2020, LR Isenman mailed ABC-205 letters to the original protestants of record and received no response therefrom.

11. Department Agents visited the Licensed Premises several times in 2021 and observed no disorderly activity or violations. On April 15, 2021, and April 23, 2021, Department Agents visited the Licensed Premises, advised management and the owner to lower the recorded music on the patio and cease recorded music emanating from the Licensed Premises because of complaints from neighbors about the noise from the premises.

12. On February 10, 2022, LR Isenman visited the Licensed Premises and saw the COVID TCA patio at the rear of the premises, which was located adjacent to the said residential apartment building with no separation factors. LR Isenman saw that several windows from the second floor of the residential building faced and looked onto the

served upon the Petitioner by mail on or about May 3, 2022, and February 15, 2023, respectively. (Exhibit D1.)

⁷ These are otherwise known as and commonly referred to as consideration points.

Petitioner's outdoor patio area. She took photographs of the COVID TCA patio and adjacent residential building. (Exhibits D6a and D6b.)

13. On March 15, 2023, LR Isenman visited the Licensed Premises at approximately 7:00 p.m. when she observed a rear patio set up with tables and chairs, hanging lights, which were on, and a big screen television on one side of the patio. LR Isenman took two photographs of the patio. (Exhibits D8a and D8b.) During that visit it was raining and she saw no patrons on the rear patio. She noticed that the expanded COVID TCA patio that had been there on February 10, 2022, was removed, so that all the parking spaces in the rear were accessible for parking. The current rear patio, while still at the rear of the Licensed Premises, did not extend as close to the residential apartment building as the prior COVID TCA patio. The patio she observed on March 15, 2023, left a little more space between the current patio and the residential apartment building.

14. On April 5, 2023, LR Isenman visited the Licensed Premises at approximately 7:45 p.m. when she observed the same patio set-up with chairs, table and large screen television, however the lights were not on and a sign was posted on the door to the patio stating, "Patio Closed." The door was propped open to the patio, which she was able to access. She observed no patrons in the rear patio on that visit. Based on the Department investigation, the objections, noise complaints from nearby residents, and the close proximity of residents, LR Isenman determined the proposed premises expansion would increase noise and interfere with the quiet enjoyment of nearby residents, especially those immediately adjacent to the Licensed Premises.

15. The San Diego PD continues to have jurisdiction over the area in which the Premises is located. At the time of the original application for the type-48 license, the protest by the San Diego PD against issuance of the type-48 license was withdrawn in consideration of the imposition of the said conditions. On October 29, 2020, LR Isenman notified the San Diego PD of the premises expansion request. On November 19, 2020, Detective Wood with the San Diego PD notified the Department of the San Diego PD's objection to the premise expansion.

16. Detective Wood appeared and testified at the hearing. Detective Wood has worked for the San Diego PD for 20 years. She is assigned to the San Diego PD's vice permits and licensing unit. She also serves as the liaison between the Department and the San Diego PD and speaks on behalf of the San Diego PD. The San Diego PD's objection was based on the grounds that (1) the Licensed Premises is located in census tract 79.05 which had a high crime rate of 534.7%⁸ and an alcohol crime rate of 3,0005%, (2) the already heavy law enforcement burden in the area of the Licensed Premises, (3) that the expansion will increase the law enforcement burden, and (4) the Licensed Premises is

⁸ Anything 120% or above is considered high crime.

located in very close proximity to residences such that a rooftop deck would interfere with the quiet enjoyment of the property of nearby residents. (Exhibit D9.)

17. The San Diego PD provided to the Department statistical data within the meaning of Section 23958.4. At the time of the original investigation when Petitioner's type-48 license was issued the Licensed Premises was in a high crime reporting district/census tract. In 2019, there were seven (7) calls for service at the Licensed Premises and 787 arrests within a 0.2-mile radius of the premises. The calls for service included two disturbing the peace with violence, threatening with a weapon and battery charges. In 2020, the percentage crime rate in census tract 79.05 was 247.5%. Anything 120% or above is considered high crime. There were seven⁹ (7) calls for service at the Licensed Premises and 315 arrests within a 0.2-mile radius of the premises. The calls for service included disturbing the peace and battery charges. Four of the seven calls for service, which were disturbance related, occurred after the Licensed Premises was issued its COVID TCA permit in May of 2020. In 2021, the percentage crime rate was 344.2%. The total number of Part I crimes was 205, and the total number of Part II arrests was 463. There were seven (7) forcible rapes, eight (8) robberies, 40 aggravated assaults, 23 burglaries, 103 larcenies, and 24 motor vehicle thefts. The arrest types included nine (9) simple assaults, 428 other Part II crimes, three (3) deadly weapons arrests, three (3) malicious mischief, 13 narcotics arrests, and four (4) other non-criminal arrests. There were 27 calls for service at the Licensed Premises, there were no arrests at the premises and 434 arrests within a 0.2-mile radius from the Licensed Premises. The majority of the calls for service were disturbances, some violent disturbances, assaults with deadly weapons, and batteries, as well as a grand theft report. There were a lot of welfare checks related to the Licensed Premises, with one example of a female passed out in her own vomit in the Licensed Premises' restroom. There were 495 alcohol-related arrests and citations in census tract 79.05, with an alcohol-related crime rate of 2,294.2%.¹⁰ In 2022, there were 28 calls for service at the Licensed Premises,¹¹ which included violent disturbances, assaults with deadly weapons and batteries. One felony battery involved a group of patrons from the Licensed Premises fighting in the alley, with a male beaten so badly his eye ruptured. The person who called the incident into the police reported that the security guard for the Licensed Premises did not seem to have control of the scene. Detective Wood said that the statistics do not capture all of the problems in the area because a lot of calls go unreported for various reasons. In the year 2020, fewer calls for service were generated with the COVID-19 Pandemic closures of restaurants and bars. Overall there is an increase in calls for service at the Licensed Premises in 2021 and 2022, with several incidents which are violent in nature resulting in more of a law enforcement problem for the San Diego PD, while the Licensed Premises was operating

⁹ Mr. Zaroni testified the Licensed Premises was closed on one of the calls for service dates, Saint Patrick's Day.

¹⁰ Tract total as a percentage of the average tract.

¹¹ Exhibits D3, D10 and D11.

with its COVID TCA patio permit from May 2020 to May 31, 2022. The calls for service statistics exemplify the multiple calls for services related to noise and the upward trend in violent disturbance calls in the last few years, which influenced the San Diego PD's decision to object to the premises expansion request. Detective Wood said that any increase in the licensed area of the Licensed Premises, no matter the size, whether to add a patio or rooftop deck, would increase the capacity at the premises and would result in law enforcement problems for the San Diego PD. The San Diego PD already has additional resources in the Pacific Beach area where the Licensed Premises is located and is struggling to keep up with the high public safety burden surrounding the Licensed Premises. The San Diego PD has received a large increase in noise complaints from residents due to the rooftop bars and exterior patios in the area.

18. SAC Ryan appeared and testified at the hearing. SAC Ryan has worked in the Pacific Beach area surrounding the Licensed Premises for 10 years. The Department receives a lot of complaints from the community and law enforcement regarding that area because it is highly concentrated with bars and restaurants in a small geographical area, and tends to attract a youthful college-age-crowd that walks from place to place, with a lot of over-consumption of alcohol, underaged drinking, fights, medical calls and recently an increase in violent crimes. The Department receives noise complaints from residences specifically relating to the Licensed Premises.

19. Jeffrey Cairncross appeared and testified at the hearing. Mr. Cairncross owns a property management company which has been managing for 20 years the apartment building immediately adjacent to the Licensed Premises. (Exhibits D6a and D6b.) Mr. Cairncross said that with the Licensed Premises' COVID TCA patio it became a circus of loud noise and music emanating from the Licensed Premises, with a line of patrons around the block. During the latter half of 2020 and into 2021 and 2022, Mr. Cairncross said he received consistent complaints from his tenants about the noise coming from the Licensed Premises, with the noise complaints beginning Friday and throughout the week. Mr. Cairncross stood in the alley several nights observing the disturbances emanating from the Licensed Premises, which he described as unreasonable, unruly and out of control. Mr. Cairncross communicated the noise complaints to Mr. Zaroni to no avail. Mr. Zaroni suggested Mr. Cairncross install new windows in the apartment building, but Mr. Cairncross had already installed new windows and the noise from the premises was still a problem. Mr. Zaroni suggested removing one of the tenants via an eviction and replacing him with one of Mr. Zaroni's employees. Mr. Cairncross rejected that suggestion outright because his tenant had been there for 10 years and he never had a problem with him. Mr. Cairncross finds the tenant is a very easy going guy, and considers him a perfect tenant. Having seen the Petitioner's proposed premises expansion, in Mr. Cairncross' opinion, as the property manager of the five-unit apartment complex adjacent to the Licensed Premises, any expansion, whether a rooftop deck or patio, would cause additional problems for his tenants.

20. Petitioner's president, Nick Zanoni, appeared and testified at the hearing. Mr. Zanoni said he applied for the premises expansion in the wake of the COVID-19 Pandemic with restaurant and bar closures and the need for outdoor air space. He said the ground floor patio expansion would add approximately 500 square feet and the rooftop deck would add approximately 1500 square feet of space. Mr. Zanoni estimated an approximate 70% increase in capacity should full premises expansion be approved. Mr. Zanoni said the COVID TCA patio allowance was 3,150 square feet and they were allowed to be open until 11:00 p.m., allowed to have live entertainment, which they did on occasion, and they were approximately four feet from the neighbor next door. Mr. Zanoni said the proposed outdoor ground-level patio would be further from the closest residential apartment building than the COVID TCA patio. Mr. Zanoni testified that the Petitioner would be amendable to limiting the operating hours on the rooftop deck and patio. In that regard he referenced an email he sent to LR Isenman on November 30, 2020, suggested restricted hours, to close at 9:00 p.m. Sunday to Thursday, and 10:00 p.m. Friday and Saturday, or earlier. Mr. Zanoni also suggested limiting the hours on the rooftop and patio to daytime use. Mr. Zanoni also proposed consulting with a licensed acoustical sound engineer and implementing sound mitigation features, such as properly installed directional audio-visual equipment, acoustically insulated overhangs, and sound absorbing furniture and carpet. (Exhibit P1.)

21. LR Isenman determined that objections related to parking fall outside the purview of the Department and is regulated by the City of San Diego.

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. Rule 64.2, states:

(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.

(2) The diagram will show all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, and common or shared entryways. Each room and/or partitioned area within the premises area shown will include a brief statement or description of the principal activity to be conducted therein, e.g., office, storeroom, toilets, bar, cardroom, billiards, etc. If any described activity shown thereon is not, or will not be, conducted under the direct control, supervision and ownership of the alcoholic beverage licensee, the name and full identification of any person or persons

who own, direct, control and/or supervise the activity will be furnished to the department together with a full disclosure of any agreement, written or oral, between the licensee and said person.

(3) If the area proposed to be licensed uses, either as a principal or secondary means of public ingress and/or egress, any common door or common passage with any other occupant of the same or adjacent buildings or rooms, a statement of the general entities conducted and the identification of the persons or entities conducting said activities will be made on the diagram.

(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 his 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 licensed premises previously diagrammed.

(B) Creation of a common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway, passage or other such means of public ingress and/or egress, when such common entryway, doorway or passage permits access to the licensed premises area from or between adjacent or abutting buildings, rooms, or premises.

(C) Where the proposed change will create in the licensed premises an area, or room, or rooms, whether or not partitioned, or in some other manner delimited and defined wherein activities of any nature not directly related to the sale of alcoholic beverages will be conducted by a person, persons, or entity not under the direct control, supervision and direction of the licensee.

(2) Where the proposed change will create in the licensed premises area, or room, or rooms, or any portion of the premises, whereby the licensee, or the owner of the real property wherein the license privileges are exercised, creates or purports to create in any persons or entity by license, easement, grant sublease, subassignment or similar means an interest in which any person or entity will conduct any activity not directly related to the sale and service of alcoholic beverages not previously conducted on the premises.

(c) Application to Winegrower's and Brandy Manufacturer's Premises. The provisions of this rule shall not apply to the premises of a winegrower or brandy manufacturer, except for those portions of such premises where sales at retail are made or wine tasting activities are conducted.

3. Business and Professions Code section 23958¹² requires the Department conduct a thorough investigation to determine, among other things, if the Applicant and the Premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application which may affect public welfare or morals. It provides, in part, that the Department shall deny an application for a license if the Applicant or the Premises do not qualify for a license under the Act.

4. Just as in a protest matter, where the Applicant bears the burden of establishing it is entitled to a liquor license from the start of the application process until the Department makes a final determination,¹³ in a matter arising from a petition the Petitioner bears the burden of proof.

5. At the time the type-48 license issued, the Licensed Premises or its parking lot was located within 100 feet of residences. Conditions were imposed, in part, based on the existence of these rule 61.4 residents and those conditions were designed to protect the nearby residents' quiet enjoyment of their property. There are 21 of those residences which still exist. Some of these residents are already adversely affected by the operations of the Licensed Premises. The closest residents are located at the rear of and adjacent to the Licensed Premises. The Department mailed notices to the 61.4 residences regarding Petitioner's proposed premises expansion request and received four objections therefrom. The main complaint from nearby residents was the loud noise emanating from the Licensed Premises. The preponderance of the evidence established that the proposed premises expansion would interfere with the quiet enjoyment of nearby residents because of the proposed premises' close proximity to nearby residents and the fact the proposed rooftop deck and outdoor patio's open-air design would inevitably allow sound to travel to nearby residents; no matter the sound mitigation efforts of positioning audio-visual equipment or sound absorbing furniture and carpet in the open-air areas. Furthermore, the Petitioner had a test run with its outdoor COVID TCA permitted patio. The evidence established that even with that patio there were overwhelming problems with the interference of nearby residents' quiet enjoyment of their property. While the Petitioner was exercising its privileges under its TCA permit, the Department received multiple noise complaints from nearby residents about noise emanating from the Petitioner's COVID TCA patio, which the Department verified. Department Agents had to notify the Licensee and its management on more than one occasion to lower the recorded music on the patio and cease allowing recorded music from emanating from the Licensed Premises because of complaints from neighbors about the noise from the premises. The outdoor patio became such a nuisance the Department had to cancel the Petitioner/Licensee's

¹² All statutory references are to the Business and Professions Code unless otherwise noted.

¹³ *Coffin v. Alcoholic Beverage Control Appeals Board*, 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420, (2006).

TCA permit. Even though the Petitioner's new proposed rear outdoor patio would not be situated as near to the closest residential apartment building as its COVID TCA patio, the proposed premises expansion areas would still be close enough that the noise emanating from the operation of the open-air rooftop deck and outdoor patio would travel to nearby residents to interfere with their quiet enjoyment of their properties. Several windows from the second floor of the residential apartment building would still face and look out onto the rooftop deck and outdoor patio of Licensed Premises, should the expansion be approved. The preponderance of the evidence established that any expansion of the Licensed Premises would cause an increase in the noise and disturb the quiet enjoyment of nearby residents. (Findings of Fact ¶¶ 1, 3-6, 9, 11-13, 16-19.)

6. Other reasons why conditions were imposed upon the Licensed Premises is reflected in Petitioner's "WHEREAS" clauses in its Petition for Conditional license, including, but not limited to, the San Diego PD's protest of issuance of the type-48 license. That protest dealt with the proposed operation of the applied for premises, the fact the premises is located in an area in which there is a significant law enforcement problem, that issuance of the subject license without conditions would not serve public convenience or necessity, and that issuance of an unrestricted license would be contrary to public welfare or morals.

7. With respect to the first prong of section 23958.4, it provides that a reporting district is high crime (and, therefore, over-concentrated) if it has a 20 percent greater number of reported crimes, as defined, than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency. In the present case, the San Diego PD provided statistical data within the meaning of Section 23958.4. Based on the evidence presented, the area in which the Premises is located is still considered a high crime reporting district/census tract. Great weight is given to the opinion of local law enforcement. Here, there was overwhelming evidence presented by San Diego PD Detective Wood that the premises expansion would add to the already heavy law enforcement and public safety burden that exists in census tract 79.05, and at the Licensed Premises, thereby causing problems for the existing strained resources of the San Diego PD. The San Diego PD already added resources in the Pacific Beach area where the Licensed Premises is located and is struggling to keep up with the high public safety burden surrounding the Licensed Premises. (Findings of Fact ¶¶ 16 and 17.)

8. Detective Wood credibly maintained that granting the Petitioner's request would aggravate existing law enforcement problems in light of the high number of alcohol-related crimes in that census tract/reporting district and the upward trend in violent disturbance calls in the last few years at the Licensed Premises. (Findings of Fact ¶ 17.)

9. The Petitioner has failed to meet its burden. Based on the preponderance of the evidence, granting the Petitioner's request to expand its premises would be contrary to public welfare and morals.

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

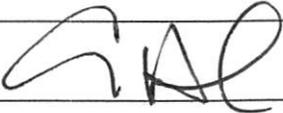
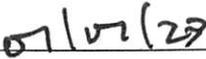
ORDER

The Petitioner's request to expand the Licensed Premises is hereby denied.

Dated: May 31, 2023



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ 
Date: _____ 

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

JERLOU CORP.
dba Thrusters Lounge
4633 Mission Boulevard
San Diego, CA 92109,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9982

) File: 48-393337
) Reg: 22092250

**DECLARATION OF SERVICE
BY E-MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 400 R Street, Suite 320, Sacramento, CA; that on the 11th day of December, 2023, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Matthew Friedrichs
Winship & Friedrichs,
A Professional Corporation
591 Camino de la Reina, Suite 909
matt@winshiplaw.com

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California, on the 11th day of December 2023.

MARIA SEVILLA