

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

AB-9832

File: 47-487135; Reg: 19088523

PACIFIC BEACH RESTAURANT
GROUP L-PSHIP,
dba El Prez Beach Bar & Cocina
4190 Missions Boulevard, Suite 271
San Diego, CA 92109-5001,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 6, 2020
Los Angeles, CA

ISSUED FEBRUARY 18, 2020

Appearances: *Appellant:* Teresa Hayashi Wales, of the Welsh Law Group, PLC,
as counsel for Pacific Beach Restaurant Group L-Pship,

Respondent: Alanna K. Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Pacific Beach Restaurant Group L-Pship, doing business as El Prez Beach Bar & Cocina, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days (with five days conditionally stayed provided that no

¹ The Department's decision, dated July 30, 2019, is included in the appendix.

further cause for discipline occurs within one year) because appellant failed to comply with a condition attached to its license, in violation of Business and Professions Code² section 23804.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on June 24, 2011.

There is one prior record of departmental discipline against the license on May 19, 2012.

On February 4, 2019, the Department filed an accusation against appellant charging that, on three separate occasions – September 20, 2018, September 26, 2018, and October 19, 2018 – appellant allowed amplified music to be audible on the third floor of the premises, in violation of condition number 4 endorsed upon its license. Condition number 4 provides:

There shall be no amplified music on the third floor patio portion of the premises as depicted in the ABC-257, Licensed Premises Diagram dated 02/02/10.

(Exhs. 4-5.)

At the administrative hearing held on May 8, 2019, documentary evidence was received and testimony concerning the sale was presented by Department Agent Chelsea Kuhn and Aaron Phillips, appellant's owner.

Testimony established that Agent Kuhn visited the licensed premises three times: September 20, 2018, September 26, 2018, and October 19, 2018. On each visit, Agent Kuhn went to the uncovered patio area on the third floor, ordered and was served a beer, and heard amplified music emanating from three holes in the patio's

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

floor. (Exh. 3.) The holes were covered by an elevated deck consisting of a roof-type material. (Exh. 6.) There was a black material covering each hole that Agent Kuhn believed to be a speaker. (*Ibid.*) However, the black material was not a speaker, but rather, a material used to prevent moisture from the ocean and fog from penetrating into the second floor of the premises. The speakers were actually mounted on the second-floor ceiling (directly underneath the third floor) and were pointed toward the three open holes and directed at the third floor patio.

On May 29, 2019, the administrative law judge (ALJ) issued a proposed decision finding that appellant violated condition number 4 and recommended that appellant's license be suspended for 15 days, with five days conditionally stayed for one year. The ALJ found that "amplified music was audible on the third floor patio and that is a violation of condition number 4." (Conclusions of Law, at ¶ 5.)

The Department adopted the proposed decision in its entirety on July 15, 2019 and issued a Certificate of Decision on July 30, 2019. Appellant filed a timely appeal contending that the Department's decision is not supported by the findings and the findings are not supported by substantial evidence.

DISCUSSION

Appellant contends that it did not violate condition number 4 of its license since the amplified music Agent Kuhn heard emanated from speakers located on the second floor. (AOB, at pp. 5-7.) Appellant argues that the Department conflates the term "amplified" with "audible." (*Id.* at p. 6.) The Department contends that condition 4 is silent as to equipment and was violated when the amplified music was heard on the third floor. (Reply Brief, at pp. 7-9.) Specifically, the Department points out that the speakers

were positioned just below the patio floor and played exclusively to be heard on that level. (*Id.* at p. 8.)

As a preliminary matter, the Board is confused as to why this type of violation is before it. Even though noise violations, vis-à-vis a license condition, technically implicate the public health, welfare, or morals, the Board fails to see why such a minor breach of public concern necessitates punitive action. This is especially true here, where the condition was poorly written, susceptible to conflicting interpretations, and easily circumvented. The Board feels that this matter would have been better suited for a warning letter to appellant, allowing them the opportunity to correct the perceived deficiency, rather than to punish them for it. This course of action would enhance transparency and business growth, which time and time again the Department touts as one of its primary goals.

Nevertheless, the Board will consider the merits of the appeal.

“The purpose of conditions on a license is to inform the licensee what it may or may not do. The licensee must be able to discern what conduct is permitted and what conduct is prohibited.” (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2018) 29 Cal.App.5th 410, 418 [240 Cal.Rptr.3d 195, 200] (“*Kajla*”).) “In construing a contract or other written instrument, we consider it ‘as a whole and interpret the language in context, rather than interpret a provision in isolation.’” (*Ibid.*)

In *Kajla*, the licensee had a condition which stated: “Beer and/or malt beverages shall be sold in original factory packages of a six-pack or greater, except malt based coolers. At no time, shall a single unit be sold individually, or in conjunction with another

brand/size container of beer and/or malt beverage to constitute a six-pack or larger quantity.” (*Kajla, supra*, 29 Cal.App.5th at 414.) The Department found the licensee violated the condition when Department agents were able to purchase a single can of 24-ounce beer, a 40-ounce bottle of malt beverage, and a 25-ounce can of beer. (*Ibid.*) There was a question as to whether the “single beverage” prohibition applied to large beers and malt beverages, since they are generally sold as individual units (or at most, three-packs for the 24-ounce cans). (*Id.* at 414-415.)

The court in *Kajla* “put the burden of clarity on the Department,” since it drafted the condition. (*Kajla, supra*, 29 Cal.App.5th at 419.) The court also “examine[d] previous decisions of the Appeals Board and Department interpreting the same or similar conditions, as these prior interpretations are relevant to determining what a reasonable licensee would have understood” (*Ibid.*) In some of those decisions, licensees were “permitted to sell single beers or malt beverages despite operating under similar or more restrictive conditions” (*Id.* at 420.) Ultimately, the court held that the Department exceeded its jurisdiction in finding a violation of the “single beverage” condition, “[b]ased on the language of the single beverage condition, when read in the context with the other 14 conditions, [and] the need for clarity in a license condition” (*Ibid.*)

In this case, there is certainly a need for clarity in a license condition, so that appellant can “discern what conduct is permitted and what conduct is prohibited.” (*Kajla, supra*, 29 Cal.App.5th at 418.) Also, like the condition in *Kajla*, this Board has issued opinions involving conditions that are similar or more restrictive than the condition at issue here. (See, e.g., *Wayde Eldon Troxell* (2017) AB-9596 [discussing the condition

"Entertainment provided shall not be *audible* beyond the area under control of the licensee"] (emphasis added); see further *Dirty Bird Lounge, LLC* (2014) AB-9401 ["There shall be no amplified music on the premises at any time"].)

Condition number 4 on appellant's license states that there "shall be no amplified music on the third floor patio portion of the premises." (Exhs. 4-5.) By the plain language of the condition's terms, appellant can reasonably deduce, that since the Department specified the third floor, it was allowed to have amplified music on the first or second floors. This is further supported by the fact that the Department did not elect to use a more restrictive condition, like in *Dirty Bird Lounge, LLC* (2014) AB-9401, which prohibited "amplified music on the premises at any time."

In addition, appellant could also deduce that it was not prohibited from having amplified music originating on the first or second floors carry to the third floor patio. This is supported by the fact that the Department did not use a condition similar to the condition in *Wayde Eldon Troxell* (2017) AB-9596. For example, the Department could have stated "amplified music [or entertainment] shall not be *audible* on the third floor patio portion of the premises." (*Ibid.*) Since it did not, we have to presume the Department intended something different. (*Kajla, supra*, 29 Cal.App.5th at 414.)

Based on the above, and in light of the Department's burden of clarity, we find that the condition's express terms, combined with the Department's decision not to use other familiar, previously-used conditions, amplified music simply being *audible* on the third floor patio is not enough to violate the condition. To violate condition number 4, a licensee could reasonably understand that it must have amplified music playing solely for the benefit of the third floor patio.

However, even based on this interpretation, appellant's reliance on the location of the speakers is misplaced. The condition prohibits amplified music, not speakers. Although all amplified music originates from some type of speaker, there is substantial evidence that amplified music was played for the sole benefit of the third floor patio, regardless of the fact that the speakers were "technically" located on the second floor.

Appellant's owner, Mr. Phillips, testified that there were holes cut into the patio floor/second floor ceiling covered by only a black moisture barrier material. (Findings of Fact, ¶ 8.) Under this black material, there were speakers mounted on the second floor ceiling that played amplified music through the holes on the patio's floor. (*Id.* at ¶ 9.) The Department found that the music was directed toward the third floor. (*Ibid.*)

Here, there is no material difference between having the speakers physically present on the third floor, level with the third floor, or just below cut-outs in the floor that allow the amplified music to play unabated on that level. A reasonable licensee in appellant's position would know from the condition's language that this type of conduct was prohibited. In fact, appellant's placement of the speakers just below the floor not only violates the spirit of the condition, it supports the inference that appellant knew it was prohibited from playing amplified music there. The Department's decision must, therefore, stand.

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.

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 ACCUSATION
AGAINST:**

**PACIFIC BEACH RESTAURANT GROUP L-PSHIP
EL PREZ BEACH BAR & COCINA
4190 MISSION BLVD., STE 271
SAN DIEGO, CA 92109-5001**

ON-SALE GENERAL EATING PLACE - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 47-487135

Reg: 19088523

CERTIFICATE OF DECISION

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 15, 2019. 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.

On or after September 9, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 30, 2019



**Matthew D. Botting
General Counsel**

RECEIVED

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**Alcoholic Beverage Control
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Pacific Beach Restaurant Group L-Pship
dba El Prez Beach Bar & Cocina
4190 Mission Blvd., Suite 271
San Diego, CA 92109-5001

Respondent

} File: 47-487135

} Reg.: 19 088 523

} License Type: 47

} Word Count: 8,293

} Reporter:

} Fabian Schwin

} Kennedy Court Reporters

On-Sale General Eating Place License.

} **PROPOSED DECISION**

Administrative Law Judge John W. Lewis, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on May 8, 2019.

Alanna Orniston , Attorney, represented the Department of Alcoholic Beverage Control.

Teresa Wales, Attorney, represented Pacific Beach Restaurant Group [Respondent].
Aaron Phillips, owner, was present throughout the hearing and did testify.

The Department seeks to discipline the Respondent's license on the grounds that, on September 20, 2018, September 26, 2018, and October 19, 2018, Respondent failed to comply with a condition attached to Respondent's license in violation of Business and Professions Code section 23804.¹ (Exhibit 1.)

Oral evidence and documentary evidence was received at the hearing. The matter was argued and submitted for decision on May 8, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on February 4, 2019.
2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on June 24, 2011 (the Licensed Premises).

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

3. Respondent has been the subject of the following discipline:

<u>Dates of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
May 19, 2012	12077487	BP§25602 BP§25753	15 day suspension

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

4. On April 28, 2017, Respondent's owner Aaron Phillips, signed a Petition for Conditional License, Form ABC-172. (Exhibit 5.) One of the conditions, condition number 4, contained therein provides that

"There shall be no amplified music on the third floor patio portion of the premises as depicted in the ABC-257, Licensed Premises Diagram dated 02/02/10."

5. On September 20, 2018, at 8:15 p.m., Department Agent Kuhn went to the premises. On the second floor she noted there were sports events playing on televisions. She then went to the third floor. She ordered and was served a beer. Agent Kuhn noted that there was amplified music emanating from the three raised areas depicted in Exhibit 3 (numbered 1, 2 and 3), Exhibit 6, and Exhibits B-1, B-2 and B-3. This amplified music was audible throughout the third floor patio area. Agent Kuhn testified that the black material under the three raised platforms was the speakers. The third floor has no roof. (See Exhibits 6, B-1, and B-2).

6. On September 26, 2018, at 1:20 p.m., Agent Kuhn returned to the premises. She went to the third floor where she ordered and was served a beer. Agent Kuhn again noted that there was amplified music emanating from the speakers beneath the three elevated decks. This amplified music was audible throughout the third floor patio area.

7. On October 19, 2018, at 7:30 p.m., Agent Kuhn again went to the premises. She went to the third floor. She ordered and was served a beer. Agent Kuhn heard amplified music emanating from the speakers beneath the three elevated decks. This amplified music was audible throughout the third floor patio area.

8. Aaron Phillips, owner, testified that there are no speakers on the third floor of the premises. According to Phillips, the black material beneath the three elevated decks on the third floor is there to prevent the moisture from the ocean and the fog from coming into the second floor of the premises. They are actually holes in the ceiling of the second floor (which can also be described as holes in the floor of the third floor) that are covered with a black material. Phillips testified that they are not speakers.

9. Upon questioning by the undersigned, Phillips acknowledged that there are speakers on the second floor that play amplified music. The speakers are mounted on the ceiling of the second floor and are pointed toward the three holes in the second floor ceiling, which is also the floor of the third floor. In other words, the amplified music is being directed toward the third floor.

10. 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 and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violations of section 23804 alleged in counts 1, 2 and 3. Specifically, on September 20, 2018, September 26, 2018, and October 19, 2018, amplified music was audible on the third floor of the premises in violation of condition number 4 endorsed upon Respondent's license. (Findings of Fact ¶¶ 4-10.)

5. The Respondent did not dispute that the amplified music audible throughout the third floor of the premises. Respondent's defense was that there are no speakers located on the third floor of the premises. The evidence presented at the hearing did establish that there are in fact no speakers located on the third floor. However, condition number 4 does not specifically prohibit speakers on the third floor. Condition number 4 prohibits amplified music on the third floor patio. Placing the speakers on the second floor ceiling and pointing them upward toward the large holes separating the second and third floors does not constitute compliance with condition number 4. The undisputable fact is that the amplified music was audible on the third floor patio and that is a violation of condition number 4.

PENALTY

Rule 144 specifies a 15 day penalty with 5 days stayed for one year for a violation of condition(s). The Department requested that the Respondent's license be suspended for a period of 15 days with no portion of the 15 days stayed. The Department believes the facts and circumstances here require an aggravated penalty.

Respondent's counsel argued that the accusation should be dismissed because there was no evidence that there were any speakers located on the third floor of the premises.

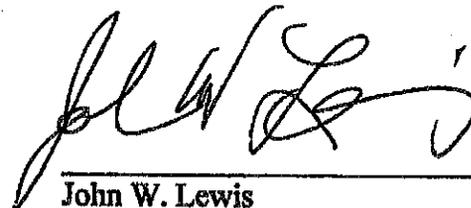
In this case Respondent seems to have tried an alternate way of providing music to the third floor of the premises. By not having speakers physically present on the third floor Respondent seems to believe that he was in compliance with condition number 4. That is not the case.

Respondent's sole prior disciplinary action is approximately 7 years prior and did not involve a condition violation. Respondent's actions in this case do not cause the penalty to be aggravated above or mitigated below the Rule 144 guidelines. The penalty recommended herein complies with rule 144.²

ORDER

The Respondents' on-sale general eating place license is hereby suspended for 15 days, with execution of 5 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: May 29, 2019



John W. Lewis
Administrative Law Judge

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob Appelquist</u>
Date: <u>7/15/19</u>