

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

AB-9937

File: 21-569340; Reg: 21091179

SANTA BARBARA GROCERY, INC.,
dba Hi Time Liquor SD
1650 East Valley Parkway
Escondido, CA 92027-2409,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: March 11, 2022
Telephonic

ISSUED MARCH 16, 2022

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for Santa Barbara Grocery, Inc.,

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

OPINION

Santa Barbara Grocery, Inc., doing business as Hi Time Liquor SD (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ denying its petition to modify and remove conditions (petition) on its current type-21 off-sale general license.

¹ The decision of the Department, dated October 19, 2021, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 26, 2016, following a person-to-person transfer of the license to appellant. The current license incorporated the same conditions imposed on the previous licensee. There is no record of departmental discipline against the current license or its predecessor.

On May 12, 2016, appellant executed a Petition for Conditional License (PCL) agreeing to the following:

WHEREAS, petitioner(s) has/have filed an application for the issuance of the above-referred-to license(s) for the above-mentioned premises; and,

WHEREAS, community members protested issuance of the applied-for license; and,

WHEREAS, the protest(s) deal(s) with the proposed operation of the applied-for premises; and,

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

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

1. No wine shall be sold with an alcohol content of greater than 15% by volume except for "Dinner Wines" which have been aged two years or more and maintained in corked bottles.
2. There shall be no amusement machines or video game devices in the premises at any time.
3. Sales and service of alcoholic beverages shall be permitted only between the hours of 9:00 a.m. and 10:00 p.m. each day of the week.
4. There shall be no exterior advertising or sign of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverages or signs which are clearly visible to the exterior shall constitute a violation of this condition.

5. Beer, malt beverages, and wine coolers cannot be sold by single containers, but must be sold in manufacturer pre-packaged multi-unit quantities.

(Exh. 4.) As explained by the Department, the conditions were imposed for the following reasons:

The grounds for imposition, commonly called 'whereas clauses,' included 'community members protested issuance of the applied-for license,' 'the protest(s) deal with the proposed operation of the applied-for premises,' and 'the issuance of an unrestricted license would be contrary to public welfare and morals.'

(Department's Reply Brief (DRB) at p. 3, citing RT 26; exh. 4.)

On March 21, 2019, appellant's counsel requested by letter that condition number 3 be modified, to allow sales from 7:00 a.m. to 12:00 a.m. (midnight) each day of the week, and that conditions four and five be removed, to allow exterior advertising, and the sale of beer, malt beverages, and wine coolers in single containers. (Petition; exh. 5.)

The Department conducted an investigation to determine whether the petition should be granted. Following the investigation, the Department's licensing representative issued a written report recommending that the petition be denied (exh. 6) because the grounds which caused the imposition of the conditions continue to exist, including: community opposition, objection by the Escondido Police Department, proximity of consideration points, and undue concentration of licenses in the census tract under section 23958.4² (relating to crime and over concentration of licenses). (Finding of Fact (FF), ¶ 6.)

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

At the administrative hearing held on July 15, 2021, testimony concerning the petition and investigation was presented by Department Licensing Representative Rebekkah Epstein; Escondido Police Detective Matt Dixon; Escondido Community Development Department principal planner Sean Nicholas; and Department District Administrator Jennifer Hill. Bassam Abdulhai, one of appellant's corporate officers, testified on its behalf.

Testimony established that the license was previously held by a different owner, with conditions that were imposed as a result of protests filed by two protestants in 2004. Both individuals withdrew their protests after the addition of conditions on the license to address their concerns, and the previous license was issued on February 10, 2005. During the person-to-person transfer of the license to appellant in 2016, the Department determined that the existing conditions were still necessary, so they were included in the PCL which was signed by appellant on May 12, 2016.

The licensed premises is a liquor store located in a multi-unit shopping center on a major thoroughfare. It is located in a predominantly commercial area with some nearby residences, but none within 100 feet of the premises. No individual protestants objected to the current petition. However, the Escondido Police Department testified in opposition to the petition on the basis of overconcentration of licenses, problems with crime and the homeless, and concern that modifying or eliminating the conditions would aggravate existing law enforcement problems. (RT 83-102; exhs. 7- 8.)

The City of Escondido Planning Division objected to the petition on the basis that removal or modification of the conditions "would be in conflict with the City of Escondido's goals to improve and revitalize the East Valley Parkway area." (RT 107-118; exh. 9.) The City of Escondido has banned liquor stores as an approved land use

in the East Valley Parkway Area Plan, but it allowed appellant's business to operate as a legal nonconforming use that could not expand. Accordingly, any changes to expand the conditional license would violate the City's zoning laws. (RT 84; Exhs. 3,7.)

The administrative law judge (ALJ) issued a proposed decision on August 26, 2021, denying the petition. The Department adopted the proposed decision in its entirety on October 8, 2021, and a certificate of decision was issued eleven days later.

Appellant then filed a timely appeal asking the Board to determine, as a matter of law, the meaning of subsection (b) of section 23803. (Appellant's Opening Brief (AOB) at pp. 1-2.)

DISCUSSION

Section 23803 pertains to the modification and removal of conditions on licenses. It originally stated:

The department ... *if it is satisfied that the grounds which caused the imposition of the conditions no longer exist*, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. The department may not remove or modify any condition to which an objection has been filed without holding a hearing as provided in Chapter 5

(Bus. & Prof. Code § 23803, emphasis added.) The legislature added subdivision (b) to section 23803 in 2018, effective January 1, 2019, which states:

For purposes of this section, a situation in which the "grounds that caused the imposition of the conditions no longer exist" includes, but is not limited to, the situation in which *there have been substantial changes in the totality of circumstances* such that the department determines that the current circumstances reasonably justify the modification or removal of the conditions.

(*Ibid.*, emphasis added.)

Appellant maintains the ALJ erred in determining: “there have been no substantial changes in the totality of circumstances such that the current circumstances reasonably justify the modification and removal of the said conditions.” (Conclusions of Law (CL), ¶ 19.) Appellant maintains that the protests to the issuance of the original license in 2004 were the sole reason that conditions were imposed, and, since nobody objected to the instant petition, it means that the grounds that caused the imposition of the conditions no longer exist. Accordingly, it argues, the Department is mandated by section 23803(b) to allow the requested modification and removal of conditions from appellant’s license. (AOB at pp. 2-3.) We disagree.

The standard of review is as follows:

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

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 114 [28 Cal.Rptr.74].)

Government Code section 11504, which governs administrative hearings in regards to licensing, states, in pertinent part:

[A] hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed shall be initiated by filing a statement of issues. The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing and, in addition, any particular matters that have come to the attention of the initiating party and that would authorize a denial of the agency action sought.

(Gov. Code, § 11504.) The California Court of Appeal has interpreted Government Code section 11504 as placing the burden of proof on the licensee. (*Coffin v. Alcoholic Bev. Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 476, 594 [43 Cal.Rptr.3d 420].)

Here, appellant sought to expand its licensing privileges through a petition for condition modification and removal. In response, the Department provided a written statement specifying the statutes and rules upon which it relied in the denial of appellant's petition. That denial prompted a hearing per Business and Professions Code section 23805, in which appellant was on notice that it must be "prepared to offer evidence to refute the reasons for denial." (Exh. 1.) "The burden of proof may properly be placed upon the applicant in application proceedings." (*Coffin, supra*, at p. 477; quoting *Martin v. Alcoholic Bev. Control Appeals Bd.* (1959) 52 Cal.2d 259, 265 [341 P.2d 296].)

Accordingly, appellant bore the burden of proof at the administrative hearing to present evidence that established substantial changes in the totality of circumstances, such that the current circumstances reasonably justified its proposed modification and removal of the conditions. (Bus. & Prof. Code, § 23803, subd. (b).) The Department found that appellant did not meet this burden of proof, and we agree.

As explained in the Department's Precedential Decision 18-01-E, *Paon Carlsbad, LLC* (2018), at p. 5: "in evaluating a petition for condition modification, in determining whether the grounds supporting a condition 'no longer exist,' the Department will look to the totality of circumstances. The factual bases for a 'whereas clause' is one circumstance to consider." Other factors for consideration include: whether or not the police department supports modification of conditions, whether there is other opposition in the community, and whether or not nearby residents may be disturbed. (*Ibid.*)

At the administrative hearing, appellant's counsel framed the issue as follows in his opening statement:

[T]hose conditions were placed on the license for the sole reason of protests being filed against a license. And the evidence will also prove that no protests are currently objecting to the removal of those two conditions or the modification of it. So the issue of the protest, the only sole issue as to why the conditions were placed on the license no longer exist.

(RT at p. 9.) This argument was addressed and refuted in the Department's decision as follows:

9. It is not enough to simply inquire whether renewed protests of original verified protestants exist. The reasons for the protest(s) must be considered as part of the factual bases of the "whereas clauses" and structure of the conditions in the PCL. In 2004, the original verified protestants, Mr. Badrani and Mr. Larson, protested based on overconcentration of licenses, as well as close proximity to a high school and unsafe ingress/egress to East Valley Parkway from the strip mall, respectively. Currently, census tract 0202.07 is still considered overconcentrated with licenses, with two (2) allowed and four (4) existing. Charter High School still exists on East Valley Parkway, just down the street from the Licensed Premises. These protest issues explain, in part, why the conditions were imposed and the factual bases for the "whereas clauses." Conditions two and four (relating to no amusement machines or video devices and no exterior advertising, etc.) were more than likely imposed to address the fact students would be traveling past the licensed premises and to prevent attracting minors to the licensed premises.

Conditions one, three, four and five were more likely imposed due to overconcentration of licenses and concerns at the time of the Escondido PD that issuance would aggravate existing law enforcement problems. Finally, all conditions were imposed because issuance of an unrestricted license would be contrary to public welfare and morals, the final "whereas clause" in the PCL.

(CL, ¶ 9.)

Section 23803(b) requires that the Department go beyond a determination of whether the original grounds for imposing conditions still exist and to consider whether there have been "substantial changes in the totality of the circumstances." This is exactly what the Department did in Conclusions of Law paragraph 19, where it determined that granting the PCL would be contrary to public welfare and morals. Based on the objections raised by the City of Escondido and the Escondido Police Department, there was ample evidence in the record to support the finding that the reasons for the imposition of conditions on the original license are still in existence: overconcentration of licenses, aggravation of law enforcement problems, and general concerns about the effects on public welfare and morals. In short, the Department's decision is supported by substantial evidence.

The question of whether there have been substantial changes in the totality of circumstances is a far broader question than appellant's framing of the issue. Merely declaring, as appellant has, that protestants failed to raise those objections in the instant matter, and that therefore the conditions should be modified or removed without further inquiry, falls short of the analysis required to determine whether section 23803(b) has been properly applied. Furthermore, appellant entirely ignores the "whereas clause" that states: "the issuance of an unrestricted license would be contrary to public welfare and morals." (Exh. 4.)

Here, the Department correctly identified the reasons for imposing the original conditions and determined that those underlying reasons still exist. The fact that the original individuals declined to object to the petition, and no new protests were filed, does not constitute a substantial change in the totality of the circumstances such that the Department is obliged to remove or modify the existing conditions.

The Board sees no error in the Department's decision.

ORDER

The decision of the Department is affirmed.³

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

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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

SANTA BARBARA GROCERY, INC.
HI TIME LIQUOR SD
1650 E VALLEY PKWY
ESCONDIDO, CA 92027-2409

FOR THE MODIFICATION AND REMOVAL OF
CONDITIONS ON THE OFF-SALE GENERAL -
LICENSE

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

SAN MARCOS DISTRICT OFFICE

File: 21-569340

Reg: 21091179

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 October 8, 2021. 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, 1325 J Street, Suite 1560, Sacramento, CA 95814. 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.

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OCT 19 2021

Sacramento, California

Alcoholic Beverage Control
Office of Legal Services

Dated: October 19, 2021



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE PETITION OF:

Santa Barbara Grocery, Inc.
Dbas: Hi Time Liquor SD
1650 East Valley Parkway
Escondido, California 92027-2409

FOR THE MODIFICATION AND
REMOVAL OF CONDITIONS ON
AN OFF-SALE GENERAL LICENSE

Under the Alcoholic Beverage Control Act

} File: 21-569340
}
} Reg.: 21091179
}
} License Type: 21
}
} Word Count: 28,729
}
} i-Depo Reporters:
} Reporter: Valerie Nunemacher
} Video Host: Kevin FitzSimons,
} Dayana Henriquez
}
}
} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter via video conference, on July 15, 2021.

Alanna Ormiston, attorney, represented the Department of Alcoholic Beverage Control (the Department).

Dean Lueders, attorney, represented Petitioner, Santa Barbara Grocery, Inc. Bassam Abdulhai, corporate officer for Santa Barbara Grocery, Inc., was present.

The Petitioner seeks to modify and remove conditions attached to its license as permitted by Business and Professions Code section 23803¹ on the basis that the grounds which caused the imposition of such conditions no longer exist. (Exhibit 1.)

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 July 15, 2021.

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

FINDINGS OF FACT

1. The Petitioner holds a type 21, off-sale general license at the above-described location (the Licensed Premises). The Petitioner has held this type-21 off-sale general license since August 26, 2016. The Licensed Premises is a liquor store.
2. A conditional type-21 license was first issued at this above-described location, on February 10, 2005 as a premises-to-premises transfer to Quang Tran, doing business as Price Liquor, a liquor store. There was no discipline against that license (number 21-415025).
3. On May 12, 2016, the Petitioner's corporate officer, Bassam Abdulhai, executed a Petition for Conditional License, which imposed five conditions on the license. The Petitioner acknowledged in its Petition for Conditional License, in part, the following:

WHEREAS, community members protested issuance of the applied-for license; and,

WHEREAS, the protest(s) deal with the proposed operation of the applied-for premises; and,

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

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

1. No wine shall be sold with an alcohol content of greater than 15% by volume except for "Dinner Wines" which have been aged two years or more and maintained in corked bottles.
 2. There shall be no amusement machines or video game devices in the premises at any time.
 3. Sales and service of alcoholic beverages shall be permitted only between the hours of 9:00 a.m. and 10:00 p.m. each day of the week.
 4. There shall be no exterior advertising or sign of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverages or signs which are clearly visible to the exterior shall constitute a violation of this condition.
 5. Beer, malt beverages, and wine coolers cannot be sold by single containers, but must be sold in manufacturer pre-packaged multi-unit quantities. (Exhibit 4.)
4. There is no record of prior departmental discipline against the Petitioner's license.

5. By letter dated March 21, 2019, the Petitioner, through its attorney, requested that condition number three be modified as follows: Sales and service of alcoholic beverages shall be permitted only between the hours of 7:00 a.m. and 12:00 a.m. (midnight) each day of the week. The petitioner further requested that condition numbers four and five be removed. (Exhibit 5.)

6. Department Licensing Representative II, Epstein, investigated the Petitioner's request and issued a written report recommending it be denied.² (Exhibit 6.) Ultimately, the Department formally denied the Petitioner's request because "...the granting of your petition would render the continuance of your license contrary to public welfare and morals, within the meaning and intent of Article XX, Section 22 of the Constitution of the State of California and of the Alcoholic Beverage Control Act, Business and Professions Code Sections 23800-23801, in that the grounds which caused the imposition of the condition(s) continue to exist."³ LR Epstein appeared and testified at the hearing. LR Epstein said that the factors the Department considered during the original application in 2004 for the type-21 license were community protests, the objection from the Escondido Police Department (PD), the proximity of consideration points and the undue concentration of licenses in the census tract under section 23958.4 (relating to crime and overconcentration of licenses).

7. Petitioner's corporate officer, Bassam Abdulhai, appeared and testified at the hearing. Mr. Abdulhai said the Petitioner is requesting to modify condition three to extend the hours, by two hours both in the morning and at night, because customers have asked for extended hours to get something at their convenience. Mr. Abdulhai does not believe the extension of hours would have a harmful impact upon the neighborhood or bring homeless to the area because most of Petitioner's customers who come in the evening are working people picking up something before going home; therefore, he said, they do not loiter and drink on the streets. Mr. Abdulhai claims the Petitioner does not have transient activity at the Licensed Premises.

8. Mr. Abdulhai said Viva Market, a grocery store with a type-21 license in the same shopping center as the Licensed Premises, is permitted to sell alcoholic beverages until 11:00 p.m. or 12 midnight. He believes Vons grocery store, which is not near the Licensed Premises, is open from 6:00 a.m. to 2:00 a.m. To Mr. Abdulhai's knowledge those two grocery stores do not cause any harm to the neighborhood by selling alcoholic beverages late into the evening. Mr. Abdulhai said the Licensed Premises has had no disciplinary history since issuance of the license in 2016. As to Detective Dixon's testimony that he saw 16-ounce single serving beers for sale in the Licensed Premises,

² LR Epstein testified at the hearing about her investigation, findings, and recommendation.

³ The denial notification was contained in the Notice of Denial of Petition to Modify or Remove Condition(s) on the License, served upon the Petitioner by mail on April 28, 2021. (Exhibit 1.)

Mr. Abdulhai had no knowledge thereof and said he would call after the hearing to verify, since he has never authorized any single containers of alcoholic beverages to be sold in the Licensed Premises. No law enforcement agency has ever complained to Mr. Abdulhai of any problems associated with or outside the Licensed Premises or that it was the cause of any police calls for service. It is the Petitioner's goal to be a good corporate citizen for the community. Mr. Abdulhai said the Petitioner always complies with all ABC laws, city laws and zoning ordinances.

9. Petitioner is requesting condition four be removed so it can advertise alcoholic beverages from the exterior, including advertising directed to the exterior from within the Licensed Premises. Mr. Abdulhai does not believe removing condition four would be harmful because, in his opinion, a patron would not be persuaded by the advertisement signs to buy alcohol when visiting the liquor store to buy something specific, such as soda. Mr. Abdulhai said the Petitioner is seeking removal of condition four because it considers that by advertising "one or another item it's cheaper for the customer and [the Petitioner will] make more money off of it." Mr. Abdulhai says that Viva Market has exterior advertising of alcoholic beverages, as well as a 7-Eleven and supermarkets which are not near the Licensed Premises. To Mr. Abdulhai's knowledge, the fact that these stores have such advertising signs does not harm the neighborhood.

10. Mr. Abdulhai said the Petitioner is seeking removal of condition five, relating to single container sales, because in his opinion, in the last few years the craft beer industry has changed and the Petitioner is losing out on this source of revenue. It is the Petitioner's position that the modern consumer is seeking expensive, highly crafted, artisan beers which are manufactured in single, 22 to 25-ounce containers, and carry a higher price tag. Mr. Abdulhai said that customers do not want to buy a three, four or six-pack of the high-quality crafted beer because it would be cost prohibitive. Mr. Abdulhai pointed out that while the Petitioner is losing out on this business revenue, Viva Market, 7-Eleven and supermarkets like Ralphs are selling single containers of craft beers, including European, Mexican and Jamaican imports, as well as single malt and single domestic brews. Mr. Abdulhai said the Petitioner's customers will walk approximately 100 feet to its competitor, Viva Market, to buy a single container craft beer because the Petitioner is prohibited from selling the same due to condition five. Mr. Abdulhai acknowledged he does not have the professional expertise to say whether alcohol sales by single containers are harming the neighborhood but says from his experience he believes it does not. The Petitioner would not oppose a condition on its license which prohibits the sale of cheap, malt liquor or single container sales of domestic beer like Budweiser or Miller beer.

(Original Application in 2004)⁴

11. At the time of the original application for the type-21 license in 2004, the applicant's proposed premises was a liquor store, doing business as "Price Liquor." An ABC-220 Report on Application for License was prepared by Licensing Representative Sims and dated November 10, 2004. (Exhibit C.) There were two verified protestants against issuance of the type-21 license. Eric Larson protested based on over-concentration of licenses and a less than safe ingress/egress to East Valley Parkway from the shopping center parking lot. Mr. Larson withdrew his protest with the imposition of the conditions. Sam Badrani was the second protestant, who protested on the grounds of over-concentration of licenses and the proximity to a nearby high school. Mr. Badrani was (and appears to remain) the corporate officer of Badrani & Pattah, Inc., doing business as Viva Market, a grocery store with a type-21 license located approximately 100 to 175 feet west of the proposed premises. Mr. Badrani also withdrew his protest.

12. Escondido Charter High School located at 1845 East Valley Parkway, approximately 1,125 feet east of the proposed premises, is separated by other businesses and a post office. In 2004, the Department determined that due to the distance the proposed premises would not affect students from the school.

13. There was an untimely protest by the Escondido PD, which has jurisdiction over the area where the premises is located. The Escondido PD objected to issuance of the type-21 license on grounds of over-concentration of licenses in the area and that it would aggravate existing law enforcement problems.

14. There was one consideration point, Intercession Church of God in Christ, located at 1722 East Valley Parkway, approximately 400 feet east of the proposed premises in the same shopping center.⁵ There was no objection by the church to the applied-for license.

15. There were no residences within 100 feet of the proposed premises. Due to the distance and multiple separation factors between the proposed premises and residences the Department determined no resident would be impacted by the operation of the premises.

⁴ The parties referred to the original application in 2005, however, the application was filed in 2004, and the license was issued on February 10, 2005. The ABC-220-P (Exhibit C) at line 17 states copies were mailed on June 28, 2004, line 18, states the premises was posted on July 1, 2004, and line 39, recommendation signature dates are November 10, 2004.

⁵ The ABC-220 report dated November 10, 2004, mistakenly reported a second consideration point of residences. (Exhibit C.) Residences do not fall within the meaning of Business and Professions Code section 23789.

16. The Department deemed the proposed premises complied with local zoning requirements and that a conditional use permit was not required.

17. The Department investigated over-concentration of licenses pursuant to section 23958.4, which sets forth a two-prong test. The first prong relates to the number of reported crimes in the relevant reporting district, and the second relates to the number of licenses within the relevant census tract. The census tract in which the proposed premises was located is 0202.07. In 2004, that census tract or reporting district was low in crime and not considered high crime pursuant to section 23958.4. Census tract 0202.07 was considered over-concentrated with licenses pursuant to section 23958.4. The type-21 license, should it then issue at the time, would not have added to the existing license count of five, where three off-sale licenses were permitted, because the application was for a premises-to-premises transfer within the same census tract.⁶

(Current Licensee)

18. The Licensed Premises is a liquor store, which sells a large variety of alcoholic beverages. It's planned operation in 2016 indicated that alcohol sales would make up 70 percent of its sales. There was no evidence that its planned operation changed since issuance of its license in 2016. The Licensed Premises is located in a multi-unit shopping center on a major thoroughfare in a mainly commercial area at 1650 East Valley Parkway in Escondido. Residences are located approximately 275 feet north or to the rear of the Licensed Premises, with separation factors of the Licensed Premises' parking lot, vegetation, chain link fencing, flood control canal known as the Escondido Creek, additional chain link fencing, a pedestrian trail, and parking. There are residences also located approximately 475 feet southeast of the Licensed Premises. There are no residences within 100 feet of the Licensed Premises.

19. There are no consideration points currently existing within the meaning of Business and Professions Code section 23789. The Licensed Premises is not located within the immediate vicinity of churches and/or hospitals or within 600 feet of schools and public playgrounds or non-profit youth facilities. The Intercession Church of God in Christ is no longer located in the same shopping center as the Licensed Premises.

20. The census tract in which the Licensed Premises is located is over-concentrated with licenses. Two off-sale licenses are allowed, and four off-sale licenses exist. Two of the four existing off-sale licenses are surrendered and considered part of the license count because they still could be reactivated. The Department determined that issuance of the license at the current location did not add to the concentration of licenses in the census tract.

⁶ Transferor license number 21-199298 to transferee license number 21-415025.

21. On or about May 8, 2019, the Department mailed notices to the Escondido City Council and Escondido PD of Petitioner's requested modification and removal of its conditions. No response was received from the Escondido City Council.

22. On May 9, 2019, the Department mailed notices to the two protestants from the original 2004 application, Mr. Larson and Mr. Badrani, informing them of the Petitioner's request. Neither Mr. Badrani or Mr. Larson replied thereto.⁷ The Department received no objections from the original protestants.

23. The reporting district in which the Licensed Premises is located is not considered high crime pursuant to section 23958.4. On May 9, 2019, the Escondido PD objected, by letter, to the Petitioner's requested modification and removal of its conditions based on the grounds that "it will aggravate existing law enforcement problems."⁸ (Exhibit 8.) The Escondido PD provided crime statistics for January 1, 2019 to December 16, 2020, which included six calls for service to the Licensed Premises.⁹ Between January 1, 2019 and November 30, 2020, within one-quarter (1/4) mile radius of the Licensed Premises, there were 215 alcohol and narcotic-related arrests or citations which included driving while under the influence (DUI), open containers, drunk-in public, and possession of controlled substances.

24. Detective Dixon of the City of Escondido PD appeared and testified at the hearing. Detective Dixon is assigned to the special investigation unit. He serves as the liaison between the Department and the Escondido PD and speaks on behalf of the Chief of Police for the City of Escondido PD. Detective Dixon confirmed that the Escondido PD continues to object to the Petitioner's request to modify and remove conditions upon its license on the grounds it will aggravate existing law enforcement problems.¹⁰ The City of Escondido's General Plan includes a goal of revitalizing the East Valley Parkway's economic district and improving the quality of life for the community. The Licensed Premises is located in a strip mall with the immediate area over-saturated with licensed premises selling alcoholic beverages. The Escondido PD generated criminal statistics for

⁷ LR Epstein testified that the Department notice mailed to one of the protestants was returned as undeliverable and there was no response from the remaining protestant. However, there was no evidence in the record which of the two protestant's mail was returned as undeliverable.

⁸ The parties argued over whether the objectors were considered protestants in the matter at hand. The law governing the modification of conditions do not permit the filing of protests. In order to avoid placing form over substance, each of these "protests" in the current matter is treated as an objection to the requested modification and removal of the conditions.

⁹ There was no evidence for what the six calls for service were.

¹⁰ Detective Dixon acknowledged the Escondido PD Chief of Police's objections filed with the Department by letters dated May 9, 2019 (Exhibit 8) and March 28, 2018 (Exhibit 7), the latter of which when the Petitioner originally petitioned requesting the same modification and removal of conditions, and subsequently withdrew its request.

the period from January 2015 to February 21, 2018, within a quarter (1/4) mile radius from the Licensed Premises, which revealed 79 drunk-in public, 31 DUI arrests, and nearly 150 drug-related arrests.

25. In Detective Dixon's experience, as a police officer for over 19 years, the crime statistics do not accurately reflect the amount of crime in the East Valley Parkway area. To the north of or behind the Licensed Premises is Escondido Creek Trail, which officers refer to as the flood control channel, a major thoroughfare for transients and criminal activity. Escondido Creek Trail is not accessible by vehicle and has no physical address. To pull up crime statistics a physical address is required. The crime statistics do not show the crime along the Escondido Creek Trail because the trail does not have an address. Thus, Detective Dixon says, many crimes occur in the area behind the Licensed Premises, which are not documented properly. Detective Dixon, for several years, was assigned to the community policing unit where he and other officers road bicycles along the Escondido Creek Trail, patrolling the area into the late evening hours. Detective Dixon, on a regular basis, came across victims of crime.

26. Detective Dixon said that easing restrictions of any licensed premises, including the modifications and removal of the conditions requested by the Petitioner, would be a drain on police resources. He says the City of Escondido as a whole, including the East Valley Parkway area in which the Licensed Premises is located, has a large problem with homeless persons purchasing beer by single containers, which creates more police calls for service and in turn consumes a fair amount of police resources. Detective Dixon sees homeless persons on a regular basis panhandling in the street for money, drunk and drinking single container beers in public. He described one occasion seeing homeless persons go to a 7-Eleven located more than five miles from the Licensed Premises, to purchase single beers because they are affordable and cool, they drink them in public, litter and panhandle in the street and create traffic hazards. Detective Dixon says this same scenario occurs 10 to 12 times a day, which drains police resources.

27. Detective Dixon had been to the Licensed Premises on four occasions on July 13, 2021. He noticed graffiti on the exterior of the Licensed Premises and when he entered the Licensed Premises, he saw three, 16-ounce single, individual cans of beer for sale in a cooler. He described the shopping center in which the Licensed Premises is located as a rundown strip mall near two major thoroughfares, East Valley Parkway and Rose Street, with a mobile home park to the south of the Licensed Premises, low-income apartment complexes to the north of Escondido Creek Trail, and Washington Park within a quarter mile northwest of the Licensed Premises. There is one authorized access point to the Escondido Creek Trail off Rose Street just north of the strip mall and northwest of the Licensed Premises.

28. On June 5, 2019, the City of Escondido Planning Division objected to the Petitioner's requested modification and removal of conditions on the basis that the Licensed Premises' existing use is considered a legal nonconforming use and the Petitioner's request would be considered an expansion of their use. (Exhibit 9.) At the time of the original application, zoning permitted the type-21 off sale general license. The Department determined that in 2019, the City of Escondido passed zoning ordinance number 2019-09, which changed the zoning for the East Valley Parkway Area Plan, where the Licensed Premises is located.¹¹ The change resulted in a liquor store, as a primary use, not listed as a permitted use or conditionally permitted use. Under the provisions of Article 61, Division 3 of the Escondido Zoning Code a nonconforming use may continue although its use does not conform to the applicable regulatory ordinance, however a nonconforming use may not be expanded where it would increase the degree of the nonconformity of the nonconforming use. The removal or modification of Petitioner's conditions would increase the degree of nonconformity of its legal nonconforming use.

29. Sean Nicholas, the principal planner with the City of Escondido Planning Division appeared and testified at the hearing. Mr. Nicholas has worked for the City of Escondido Planning Division for 17 years. He said a section of the zoning code does not allow for the expansion of nonconforming uses, which would be the result of the Petitioner's request. The goal of the zoning code is to bring all nonconforming uses and structures into conformance with the current requirement. He explained the difference between a liquor store as a primary use location versus a grocery store as a primary use location within the East Valley Parkway Area Plan. A liquor store's primary use refers to the majority of their sales, which are for alcoholic beverage purposes and not for other types of merchandise. Whereas a grocery store's primary use would be for the sale of a variety of other items, and not just for alcoholic beverages.

30. Supervising Agent in Charge (SAC) Hill from the San Marcos District Office for the Department appeared and testified at the hearing. SAC Hill was familiar with the conditions imposed upon the Licensed Premises and Viva Market. She said there are many reasons why Viva Market's type-21 license conditions are different than the Petitioner's type-21 license conditions. Each application for a license is investigated on a case-by-case basis, based on its own merits and on the totality of the investigation, including, but not limited to, what statutes and rules apply, and the premises' daily operations. SAC Hill said that two type-21 licenses which have different operations will have different conditions imposed upon them, similar to the Licensed Premises and Viva Market.

¹¹ Mr. Nicholas testified to some zoning ordinance, which he did not specify, that was in place in 2004, "from some information" he saw. Because it was not made clear which specific zoning ordinance to which he referred, it was determined to be a different ordinance from zoning ordinance number 2019-09.

31. Viva Market's planned operation upon issuance of its type-21 license estimated alcohol sales between 10 and 12 percent, with commodity sales making up the rest. Viva Market has more restrictive conditions including that the premises shall be maintained and operated as a market as well as the commonly known 50/50 mandate. The 50/50 condition requires the quarterly gross sales of alcoholic beverages shall not exceed the quarterly gross sales of food during the same period; that the licensee shall at all times maintain records, which reflect separately the gross sales of food and the gross sales of alcoholic beverages of the licensed business; and that said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution provides that the Department of Alcoholic Beverage Control has the power, in its discretion, to deny an application for an alcoholic beverage license if it determines for good cause that the granting of the license would be contrary to public welfare or morals.
2. Section 23800 provides that "[t]he department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges . . . [i]f grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions."
3. Previously, section 23803 provided that "[t]he department, upon its own motion or upon the petition of a licensee[,] . . . if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification."
4. Section 23803 was amended effective January 1, 2019. Section 23803(a) contains the language cited in the preceding paragraph. A new subsection, 23803(b), was added. Subsection 23803(b) provides that "a situation in which the 'grounds that caused the imposition of the conditions no longer exist' includes, but is not limited to, the situation in which there have been substantial changes in the totality of circumstances such that the department determines that the current circumstances reasonably justify the modification or removal of the conditions."
5. Looking at the new standard set forth in section 23803(b), the question, or burden of proof on the Petitioner, is whether there have been substantial changes in the totality of circumstances such that the current circumstances reasonably justify the modification of the conditions.

6. In the present case, the two original, verified protestants from 2004, made no objections to the Petitioner's request to modify condition three and remove conditions four and five. The Petitioner argues the inquiry should end there because LR Sims said at one point in his 2004 dated ABC-220 report (Exhibit C) that "Conditions are being imposed to alleviate the concerns of the protestants." Petitioner also argues there is a "whereas clause" relating to protestants in the Petition for Conditional License at issue. The Petitioner claims it was therefore put on notice that the verified protests were the reason for the imposed conditions. The Petitioner argues that since there are no renewed protests by Mr. Larson and Mr. Badrani the reason for the imposition of conditions no longer exists, and the totality of the circumstances include Petitioner's discipline-free operation and the fact no law enforcement notified Mr. Abdulhai there were any problems associated with or outside the Licensed Premises (including police calls for service). This argument fails to apply the appropriate standard and disregards completely the language in the Petition for Conditional License by which the Petitioner agreed to be bound. (Exhibit 4.) The "whereas clauses" therein placed the Petitioner on notice that conditions were imposed for multiple reasons, including that "community members protested issuance of the applied-for license;" which "protest(s) deal(s) with the proposed operation of the applied-for premises;" and that "issuance of an unrestricted license would be contrary to public welfare and morals." The inquiry does not end there.

7. Precedential Decision No. 18-01-E provides in part, that an application for a license is independently investigated and if conditions are necessary to mitigate a concern, the determination of how those conditions are structured and their wording is distinct as to each license issued. The Precedential Decision further provides that when the Department "does impose conditions, there are many considerations in deciding, under the totality of the circumstances, what conditions to impose and their wording." "Similarly, in evaluating a petition for condition modification, in determining whether grounds supporting a condition 'no longer exist,' the Department will look" to a number of factors "in evaluating the totality of the circumstances." The Precedential Decision points out that the "factual bases for a 'whereas clause' is one circumstance to consider." Other factors to consider in evaluating the totality of circumstances are whether "the police department supports the modification" and/or removal of conditions.¹²

8. The undersigned will look to the totality of the circumstances relating to this distinct type-21 license, the factual bases for the "whereas clauses" and the structure and wording of the conditions imposed on the type-21 licenses at issue.

¹² *Cal. Dept of ABC v. PAON Carlsbad LLC*, Precedential Decision No. 18-01-E (September 4, 2018) at pp.4, 5, ¶¶ 6 and 8.

9. It is not enough to simply inquire whether renewed protests of original verified protestants exist. The reasons for the protest(s) must be considered as part of the factual bases of the “whereas clauses” and structure of the conditions in the PCL. In 2004, the original verified protestants, Mr. Badrani and Mr. Larson, protested based on overconcentration of licenses, as well as close proximity to a high school and unsafe ingress/egress to East Valley Parkway from the strip mall, respectively. Currently, census tract 0202.07 is still considered overconcentrated with licenses, with two (2) allowed and four (4) existing. Charter High School still exists on East Valley Parkway, just down the street from the Licensed Premises. These protest issues explain, in part, why the conditions were imposed and the factual bases for the “whereas clauses.” Conditions two and four (relating to no amusement machines or video devices and no exterior advertising, etc.) were more than likely imposed to address the fact students would be traveling past the licensed premises and to prevent attracting minors to the licensed premises. Conditions one, three, four and five were more likely imposed due to overconcentration of licenses and concerns at the time of the Escondido PD that issuance would aggravate existing law enforcement problems. Finally, all conditions were imposed because issuance of an unrestricted license would be contrary to public welfare and morals, the final “whereas clause” in the PCL.

10. Petitioner wants to ignore the fact that the Escondido PD objected to issuance of the license in 2004. However, LR Epstein testified that the Escondido PD’s objection was one of many factors considered during the Department’s investigation in 2004. In fact, the Department investigated the protest concern of over-concentration of licenses pursuant to section 23958.4’s two-prong test involving reported crimes in the relevant reporting district, and the number of licenses within the relevant census tract. This requires the input from the Escondido PD, which has jurisdiction over the area where the Licensed Premises is located. Based on these and other factors specific wording was incorporated in the PCL which was distinct to the type-21 license at issue and the totality of the circumstances. For example, the second “whereas clause,” provides, “community members protested issuance of the applied-for-license.” The Escondido PD makes up a part of that community, along with residents. Of note is the fact that the PCL did not include the typical wording used when there are verified protestants, for example, “WHEREAS, protest(s) has/have been filed against issuance of the applied-for license.” It is more likely than not the chosen wording was used to incorporate the totality of the circumstances and the factual bases for the “whereas clause.”

11. The PCL’s third “whereas clause” provides, “the protest(s) deal(s) with the proposed operation of the applied-for premises.” Based on the premises proposed operation as a liquor store in 2004, community protests were made, including, the Escondido PD’s objection that issuance would aggravate existing law enforcement problems. The Licensed Premises is a liquor store, with a planned operation that alcohol sales make up

70 percent of its sales. A preponderance of the evidence established that community members object to granting Petitioner's requested condition modification/removal, which includes the Escondido PD. Precedential Decision No. 18-01-E states that in evaluating a petition for condition modification a factor to consider in evaluating the totality of the circumstances is "whether the Police Department supports the modification of the condition [or removal thereof], that there is no apparent opposition (other than that based upon a phone call with the Planning Department)." ¹³ In the present matter, there is outright opposition, with filed objections by both the Escondido PD and the City of Escondido Planning Division, and appearances by both at the hearing to lodge and explain their objections at length. ¹⁴ Detective Dixon credibly maintained that granting the Petitioner's request would aggravate existing law enforcement problems and cause a drain on police resources.

12. Mr. Abdulhai said that no law enforcement agency has complained to him of problems occurring at the Licensed Premises, and that he himself finds there to be no homeless problem at the Licensed Premises. This may be evidence that the imposed conditions upon the license, including conditions three, four and five, are doing their job in mitigating community member concerns, as well as addressing the "whereas clauses" and the reasons for imposition of said conditions. However, the mere fact that law enforcement has not "complained" to Mr. Abdulhai of any problems associated with or calls for service at the Licensed Premises, is not evidence of their non-existence. The Escondido PD produced crime statistics that from January 1, 2019 to December 16, 2020, there were six calls for service to the Licensed Premises, and between January 1, 2019 and November 30, 2020, within one-quarter (1/4) mile radius of the Licensed Premises, there were 215 alcohol and narcotic-related arrests or citations which included DUI's, open containers, drunk-in public, and possession of controlled substances. The evidence established that both Viva Market and 7-Eleven have exterior advertising and sell alcohol by single containers. Detective Dixon credibly maintained that law enforcement problems exist at the 7-Eleven and within the vicinity of the Licensed Premises, which area includes Viva Market. Those law enforcement problems specifically relate to alcohol sales by single containers, with homeless persons purchasing alcohol by single

¹³ *Cal. Dept of ABC v. PAON Carlsbad LLC*, Precedential Decision No. 18-01-E (September 4, 2018) at p.5, ¶ 8.

¹⁴ The City of Escondido Planning Division objected to the Petitioner's request on the basis that the section of the zoning code at issue does not allow for the expansion of nonconforming uses, which would be the result of the Petitioner's request and which would increase the degree of nonconformity of its legal nonconforming use. The Petitioner boasts of "always comply[ing]" with zoning and other laws. However, when presented with the Escondido City Planning Division's objection, it is surprising the Petitioner pushes against the zoning ordinance and the general plan to revitalize the East Valley Parkway district.

containers, panhandling, drunk in public and creating traffic hazards, which drain police resources. Based on Detective Dixon's testimony, modifying condition three, and eliminating conditions four and five, would exacerbate existing law enforcement problems which the police already encounter in the area. Greater weight is given to testimony of law enforcement, who testify based on professional experience and crime statistics in the area. Whereas Mr. Abdulhai testified as to his "belief" that Petitioner's request to modify and remove conditions would not be harmful to the community. He said that to his "knowledge" Viva Market, other grocery stores and 7-Eleven's ability to have longer operational hours, exterior advertising and alcohol sales by single containers did not harm the community. However, Mr. Abdulhai provided no crime statistics and no evidence upon which he based his belief and knowledge. Mr. Abdulhai acknowledged he does not have the professional expertise to say whether alcohol sales by single containers are harming the neighborhood.

13. Petitioner argues the police department was not a verified protestant in 2004 because of its untimely protest in 2004, and therefore has no standing to "now somehow raise an objection." The Petitioner argues the testimony and evidence presented at the hearing from the City of Escondido PD and Planning Division are irrelevant and should be disregarded, since they are not protestants but objectors, and therefore have no standing in the current matter. The Petitioner argues that objectors should not be considered in determining whether the Petitioner's request should be granted.

14. These arguments are rejected. The fact the Escondido PD's protest was untimely, means they could not ask for a hearing in 2004, but it does not mean their input was irrelevant to the Department's investigation and is not relevant now. The Petitioner provides no legal basis for disregarding or striking otherwise credible testimony of non-protesting witnesses. The law governing the modification and removal of conditions does not permit the filing of protests but objections. As pointed out above, Precedential Decision No. 18-01-E provides that factors in evaluating the totality of the circumstances include opposition by others including the city's police department and planning division. Hence, the objections filed by the City of Escondido's Planning Division and Police Department are relevant. Furthermore, the Escondido PD and Planning Division are active members of the community entitled to lodge objections. They both explained how the Petitioner's request would negatively impact public welfare and morals and the city's general plan to improve the community's quality of life, promote opportunities, incentives and revitalize the East Valley Parkway district.

15. At the time of the hearing, the reporting district or census tract in which the Licensed Premises is located was not considered high crime. However, great weight is given to the existence of identifiable law enforcement problems. Detective Dixon testified at length how the Petitioner's request for condition modification and removal would aggravate law enforcement problems, and negatively impact and cause a drain on law enforcement

resources. While the Petitioner pointed out that one of Detective Dixon's examples included a 7-Eleven store more than five miles from the Licensed Premises, Petitioner disregards the detective's testimony that the City of Escondido *as a whole, including the East Valley Parkway area in which the Licensed Premises is located*, has a large problem with homeless persons purchasing single beer containers, creating more police calls for service and draining police resources. Detective Dixon credibly testified to the criminal element behind the Licensed Premises with a direct access point to the strip mall, specifically, the Escondido Creek Trail frequented with crime. There is no evidence that extending the Licensed Premises' hours of operation and removing conditions four and five would minimize this law enforcement impact; rather, such an extension and removal of conditions would shift the impact to a later and earlier hour.

16. Petitioner argues, in some form, although not directly, that the current circumstances reasonably justify the modification/removal of the conditions. Petitioner seeks modification of condition three to extend the hours of operation for customer convenience. Mr. Abdulhai says the reason the Petitioner seeks removal of condition four is to "make more money off of it," and "one or another item it's cheaper for the customer." The desire to generate more revenue is Petitioner's reason for seeking removal of condition five.

17. Petitioner argues that other licensed premises were issued different hours restrictions and are not limited by Petitioner's conditions four and five. Petitioner believes it should be able to have extended hours, exterior advertising and the right to sales of alcoholic beverage by single containers like Viva Market and other supermarkets, because it is losing out on business. While the issuance of other licenses without the same restrictive conditions may be a factor/circumstance to consider, that fact alone, without more is not a justification to remove or modify a condition given that each application is independently evaluated.¹⁵ Petitioner again ignores one of the reasons for its imposed conditions, namely based on the operation of its premises. Petitioner is a liquor store, comparing itself to grocery stores. SAC Hill explained there are many reasons why other premises have different conditions than the Petitioner's conditions. Each application for a license is investigated on a case-by-case basis, based on its own merits and on the totality of the investigation, including, but not limited to, what statutes and rules apply, and the premises' daily operations. Two type-21 licenses which have different operations will have different conditions imposed upon them, similar to the Licensed Premises and Viva Market. The primary use of the Licensed Premises' is for alcohol sales, with alcohol sales making up 70 percent of its sales. Whereas Viva Market's primary use is for the sale of commodities with a planned operation of alcohol sales between 10 and 12 percent. Viva Market has additional, more restrictive conditions than the Petitioner, which restrict

¹⁵ *Cal. Dept of ABC v. PAON Carlsbad LLC*, Precedential Decision No. 18-01-E (September 4, 2018) at p.5, ¶ 7.

Viva Market's operation and limit some of their sales, including that the premises shall be maintained and operated as a market as well as the commonly known 50/50 mandate.

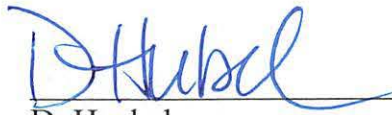
18. Precedential Decision No. 18-01-E maintains that, "It is overly simplistic to assert that all licenses in the vicinity should have the same conditions. Without more, simply arguing that it is unfair to have different operating conditions does not satisfy the licensee's legal burden under section 23803. If that is all that is required, licensees could pick and choose which conditions they want on their license based upon what other licensees close by have on theirs. This would fundamentally defeat the particularized assessment of the appropriateness of conditions on individual licenses without regard for all surrounding factors."¹⁶

19. The Petitioner has failed to meet its burden. Based on the preponderance of the evidence, there have been no substantial changes in the totality of circumstances such that the current circumstances reasonably justify the modification and removal of the said conditions. Granting the Petitioner's request to modify condition three and remove conditions four and five of its Petition for Conditional License would be contrary to public welfare and morals.

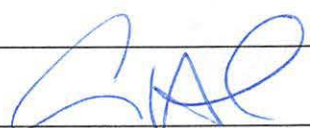
ORDER

The Petitioner's request, to modify condition number three and remove conditions four and five, is hereby denied.

Dated: August 26, 2021



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>10/08/21</u> _____

¹⁶ *Cal. Dept of ABC v. PAON Carlsbad LLC*, Precedential Decision No. 18-01-E (September 4, 2018) at p.5, ¶ 8.