

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

**AB-9943**

File: 47-597692; Reg: 21091221

LAS CAZUELAS TAQUERIA, INC.,  
dba Las Cazuelas Taqueria  
55 Race Street  
San Jose, CA 95126-3125,  
Appellant/Applicant

v.

BRETT FRAZIER, *et al*,  
Protestants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondents

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: May 13, 2022  
Sacramento, CA

**ISSUED MAY 16, 2022**

*Appearances:*      *Appellant/Applicant:* Graciela Araras, *in propria persona*, on behalf of Las Cazuelas Taqueria, Inc.,

*Respondents:* Protestants: Chris Gaffney, Elena Fernandez, and Gustavo Fernandez, *in propria persona*; and Patrice Huber, as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

Las Cazuelas Taqueria, Inc. (appellant/applicant), appeals from a decision of the Department of Alcoholic Beverage Control (Department),<sup>1</sup> sustaining objections by protestants on the basis of noise issues and denying the application of Las Cazuelas Taqueria, Inc. for a on-sale general eating place license.

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<sup>1</sup> The decision of the Department, dated November 30, 2021, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

In 2006, the Department issued Graciela and Jose Armas, husband and wife, a type-41 on-sale beer and wine eating place license for their premises known as Las Cazuelas Taqueria. A type-41 license permits the licensee to retail in beer and wine for consumption on the licensed premises and must be used in conjunction with a bona fide eating place as described in section 23038.<sup>2</sup>

In 2011, Graciela and Jose Armas transferred the license to Las Cazuelas Taqueria, Inc., the applicant herein. Subsequently, following a dissolution of marriage, Graciela Armas became the sole shareholder of Las Cazuelas Taqueria, Inc. The current type-41 license is subject to 13 conditions restricting its use as follows:

1. There shall be no exterior advertising of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages.
2. At all times when the premises are open for business the sale of alcoholic beverages shall be incidental to the sale of food.
3. The petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
4. There shall be no pool tables or coin-operated amusement devices maintained upon the premises at any time.
5. No alcoholic beverage shall be consumed on any property adjacent to the premises over which they have control.
6. There shall be no bar or lounge area upon the licensed premises maintained for the purpose of sales, service or consumption of alcoholic beverages directly to patrons for consumption.
7. The sale of beer and or wine for consumption off the premises is strictly prohibited.

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<sup>2</sup> All statutory references are to the Business and Professions Code unless otherwise indicated.

8. There shall be no live entertainment, amplified music, karaoke, or dancing permitted on the premises at any time.
9. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 8:00 AM and 10:00 PM each day of the week.
10. The subject alcoholic beverage license shall not be exchanged for a public premises type license.
11. The patio area of the premises shall be equipped with lighting of sufficient power to illuminate and make easily discernible the appearance and conduct of all persons on or about the patio area. Additionally, the position of said lighting shall not disturb the normal privacy and use of any neighboring residences.
12. All alcoholic beverages will be sold and served in containers which shall be distinctive in design and color and easily distinguishable from any other containers used in the service of non-alcoholic beverages.
13. Whenever or wherever within the licensed premises the licensee or employee give or serve any alcoholic beverages, the licensee or employee shall personally give or serve said alcoholic beverages to the person who has ordered and/or will be consuming said alcoholic beverages. Alcoholic beverages may not be given or served to one person to be passed along to another person.

(Exh. D-8.) There are two instances of prior departmental discipline against the license.

In 2018, applicant petitioned for issuance of a type-47 on-sale general eating place license to replace its current type-41 on-sale beer and wine eating place license. A type-47 license would permit it to retail in beer, wine, and distilled spirits for consumption on the licensed premises in conjunction with its operation as a bona-fide eating place. Protests were filed against the issuance of the new license, and an administrative hearing was held on August 12, 2021. At that hearing, oral and documentary evidence was presented concerning the application and the protests. The applicant was represented by legal counsel at the administrative hearing, but is proceeding *in propria persona* on appeal.

Testimony established that following the application for the new license, an investigation was conducted by one of the Department's licensing representatives. Based on her investigation, she recommended the application be denied on the basis that the applicant has a disqualifying disciplinary history, having suffered two prior disciplinary actions against its current license; and the fact that the applicant's premises or its parking lot is located within 100 feet of 15 residences. (Finding of Fact, ¶ 1.)

Protests were filed by several individuals against issuance of the type-47 license. Accordingly, the administrative law judge (ALJ) was tasked with determining whether granting the license would be contrary to public welfare or morals by reason of Article XX section 22, of the California Constitution and California Business and Professions Code section 23958 in that, if licensed, normal operation of the applied for premises would:

- 1) unreasonably interfere with the quiet enjoyment of the homes of nearby residents;
- 2) create or result in added homeless persons, unruly persons, or disruptive persons in the area;
- 3) create or result in undue noise in the area;
- 4) create or result in undue litter in the area;
- 5) create or result in public urination in the area; and
- 6) create or add to an undue concentration of licenses in the area.

(Finding of Fact, ¶ 2.)

The ALJ issued a proposed decision on September 11, 2021, denying the application for a type-47 license at the premises, and sustaining the protests of Chris Gaffney, Elena Fernandez, and Gustavo Fernandez on the basis of noise issues. (Decision, at p. 18.) The protest of Brett Frazier was withdrawn. The Department

adopted the proposed decision in its entirety on November 24, 2021, and a certificate of decision was issued six days later.

Appellant thereafter filed a timely appeal making the following contentions: (1) appellant was not given sufficient time to review and investigate the exhibits presented by the protestants at the administrative hearing, and (2) the protestants failed to provide evidence that issuance of a type-47 license would affect the quiet enjoyment of the neighborhood.

## DISCUSSION

### I

#### EXHIBITS PRESENTED AT ADMINISTRATIVE HEARING

Appellant contends it was not given sufficient time to review and investigate the exhibits presented by the protestants at the administrative hearing. (AOB at p. 4.) Beyond this general contention, appellant fails to explain why it did not request a continuance at the administrative hearing in order to review and investigate this material. Nor does it articulate why counsel for the applicant did not raise this argument at the administrative hearing beyond a passing comment that exhibit P-2 was presented as “late discovery.” (RT, at p. 195)

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434];

*Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Furthermore, appellant has not established that it was prejudiced in any way by not having more time to review and investigate the protestants' exhibits. Even if we did find that this somehow constituted error, appellant has not demonstrated that giving it more time would have changed the outcome in this case. In order for this Board to grant relief, an appellant must show prejudice:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13.) "Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Gov. v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [250 Cal.Rptr.3d 459]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) Such a showing has not been made in this case.

## II

### SUBSTANTIAL EVIDENCE

Appellant contends the protestants failed to provide evidence that issuance of a type-47 license would affect the quiet enjoyment of the neighborhood. (AOB at pp. 5-6.) In other words, it maintains the decision is not supported by substantial evidence.

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

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

*(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)*

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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

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

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

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

Therefore, the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic*

*Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, 212 Cal.App.2d at p. 114.)

The California Court of Appeal has placed the burden of proof on the licensee in application matters. (*Coffin v. Alcoholic Bev. Control Appeals Bd.* (2006) 139 Cal.App.4th 471, 476-477, 594 [43 Cal.Rptr.3d 420] ["The burden of proof may properly be placed upon the applicant in application proceedings".]) Here, appellant sought to expand its licensing privileges by applying for an on-sale general eating place license to replace its current on-sale beer and wine eating place license.

Accordingly, appellant bore the burden of proof at the administrative hearing to present evidence that established that the protests and findings of the licensing representative were unfounded and that it was entitled to the applied-for privileges of an on-sale general eating place license. The Department found that appellant did not meet this burden of proof, and we agree.

In the decision, the ALJ specifically addressed the issue of quiet enjoyment and reached the following conclusions on this issue:

In a license application such as this, applicant has the ultimate burden to establish it is entitled to issuance of the license. Both applicant and applicant's premises must qualify for the license. **Under rule 61.4, if there are residents within 100 feet of applicant's premises or its parking lot a retail license application should be denied unless applicant can show that, if licensed as requested, operation of "the business would not interfere with the quiet enjoyment of the property by residents."** As discussed above, applicant's overall performance history under its type-41 license included not only formal disciplinary actions but recent acts and activities that were contrary in letter and/or spirit to its current set of license conditions. Also, as described above, there are 15 residences within 100 feet of applicant's premises or its parking lot. **The protestants presented evidence applicant's operation has actually disturbed the quiet enjoyment of their homes in the past. Applicant did not sufficiently establish that if issued a type-47 license, operation of its business would not interfere with the quiet**



**enjoyment of those residences with 100 feet of the premises or its parking lot as required under rule 61.4.** Based on these considerations, applicant has not demonstrated by a preponderance of the evidence that it and the applied for premises are qualified to be issued a type-47 on-sale general license. Therefore, applicant has not shown it is entitled to the agency action sought and the application should be denied.

(Decision, at p. 17, emphasis added.)

We have carefully reviewed the extensive record in the matter, and find no error in the decision's findings or conclusions. It is not this Board's role to re-hear the case and reweigh the evidence; that is the role of the ALJ and the Department. The decision is amply supported by substantial evidence and the Board cannot reweigh the evidence to reach a contrary conclusion.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup> 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](mailto:abcboard@abcappeals.ca.gov)

# APPENDIX

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

**IN THE MATTER OF THE PROTEST OF:**

BRETT FRAZIER, ET AL

**AGAINST THE ISSUANCE OF A LICENSE TO:**

LAS CAZUELAS TAQUERIA, INC.  
LAS CAZUELAS TAQUERIA  
55 RACE STREET  
SAN JOSE, CA 95126-3125

ON-SALE GENERAL EATING PLACE - LICENSE

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

SAN JOSE DISTRICT OFFICE

File: 47-597692

Reg: 21091221

**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 November 24, 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.

**RECEIVED**

NOV 30 2021

Alcoholic Beverage Control  
Office of Legal Services

Sacramento, California

Dated: November 30, 2021



Matthew D. Botting  
General Counsel

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

|   |   |                               |
|---|---|-------------------------------|
| IN THE MATTER OF THE PROTEST OF:          | } | File: 47-597692               |
|   | } |                               |
| Brett Frazier, et., al.                   | } | Reg: 21091221                 |
|   | } |                               |
| Against Issuance Of A Type-47 License To: | } | License Type: 47              |
|   | } |                               |
| Las Cazuelas Taqueria, Inc.               | } | Video Hearing Date: 8-12-2021 |
| Db: Las Cazuelas Taqueria                 | } |                               |
| 55 Race Street                            | } | Word Count Estimate: 41,591   |
| San Jose, California 95126                | } |                               |
|   | } | Reporter: Zoanne Williams-CSR |
| AND IN THE MATTER OF THE PETITION         | } | iDepo Reporting Service       |
| BY LAS CAZUELAS TAQUERIA, INC. FOR        | } |                               |
| ISSUANCE OF SAID LICENSE                  | } |                               |
|   | } |                               |
| Under the California Constitution and the | } |                               |
| <u>Business and Professions Code</u>      | } |                               |

Administrative Law Judge David W. Sakamoto (hereafter the ALJ), Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter via a video conference on August 12, 2021.

Patricia Huber, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

Dean Lueders, attorney-at-law, represented petitioner-applicant Las Cazuelas Taqueria, Inc., (hereafter applicant). Graciela Armas, 100% shareholder of applicant corporation, also attended the hearing as did her son, John Paul Armas-Reyes.

Protestants Christopher Gaffney, Gustavo Fernandez, and Elena Fernandez appeared as self-represented litigants. They were allowed to appear and participate in the hearing as parties pursuant to California Government Code section 11500, subdivision (b).

Protestant Brett Frazier did not appear at the hearing.

## **SUMMARY OF PROCEEDINGS**

1. In 2018, applicant applied for a type-47 on-sale general bona-fide eating-place license to replace its existing type-41 on-sale beer and wine bona-fide eating place license.<sup>1</sup> Protestants filed protests against issuance of the type-47 license. After its investigation, the Department denied the application. Applicant requested an administrative hearing on that denial. Protestants Brett Frazier, Chris Gaffney, Elena Fernandez, and Gustavo Fernandez requested a hearing on their protests. On August 12, 2021, a consolidated video hearing was conducted on the denial of the application and the protests against issuance of the license. Oral and documentary evidence was heard and received. The matter was argued and submitted for decision on August 12, 2021.

## **ISSUES TO BE DETERMINED**

1. As to the Department's recommendation the application be denied, the issue to be determined is whether granting the license would be contrary to public welfare or morals by reason of Article XX, section 22, of the California Constitution and California Business and Professions Code section 23958.<sup>2</sup> The Department's Statement of Issues contended the application should be denied on two primary grounds, to wit:

1) applicant has a disqualifying disciplinary history in that since 02/02/2011, when applicant was licensed with a type-41 on-sale beer and wine license, it suffered two prior disciplinary actions against that license; and

2) applicant's premises or its parking lot is located within 100 feet of 15 residences within the meaning of California Code of Regulations, title 4, section 61.4 (hereafter rule 61.4).<sup>3</sup>

2. As to the protests filed against issuance of the type-47 license, the issue to be determined is whether granting it would be contrary to public welfare or morals by reason of Article XX,

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<sup>1</sup> Business and Professions Code section 23038 specifies what constitutes a bona fide eating place for purposes of Department licensing.

<sup>2</sup> All section references are to the California Business and Professions Code unless noted otherwise. All references to rules are those sections in California Code of Regulations, title 4, division 1, unless noted otherwise.

<sup>3</sup> This reflects a summary of the two grounds for application denial set forth in more factual detail in the Department's Statement of Issues.

section 22, of the California Constitution and California Business and Professions Code section 23958 in that, if licensed, normal operation of the applied for premises would:

- 1) unreasonably interfere with the quiet enjoyment of the homes of nearby residents;
- 2) create or result in added homeless persons, unruly persons, or disruptive persons in the area;
- 3) create or result in undue noise in the area;
- 4) create or result in undue litter in the area;
- 5) create or result in public urination in the area; and
- 6) create or add to an undue concentration of licenses in the area.

### **FINDINGS OF FACT**

1. In 2006, the Department issued Graciela and Jose Armas, husband and wife, a type-41 on-sale beer and wine eating place license for their premises known as Las Cazuelas Taqueria at 55 Race Street, San Jose, California. A type-41 license permits the licensee to retail in beer and wine for consumption on the licensed premises and must be used in conjunction with a bona fide eating place as described in section 23038. At or about that time, Graciela and Jose also purchased the land under the licensed premises. They also purchased a parcel next to the licensed premises off of Race Street to be used as its exclusive parking lot. They also purchased a residential parcel at 1150 Sierra Avenue that is adjacent to the Sierra Avenue side of the premises.

2. In 2011, Graciela and Jose Armas transferred the license to Las Cazuelas Taqueria, Incorporated, the applicant herein. Graciela and Jose co-owned that corporation. Due to a recent dissolution of marriage action, Graciela Armas is now applicant's 100% stockholder and works full time at applicant's premises. Applicant's type-41 license has been and remains subject to 13 conditions restricting its use. (Exhibit D-8: Petition for Conditional License).<sup>4</sup>

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<sup>4</sup> Condition 1 bans exterior advertising of alcoholic beverages. Condition 2 requires the sale of alcoholic beverages be incidental to the sale of food. Condition 3 requires the area adjacent to the premises be kept litter free. Condition 4 bans pool tables or coin

3. Jose Armas no longer works at applicant's premises. John Paul Armas-Reyes (hereafter John Armas), the 26 year old son of Graciela and Jose Armas, works at applicant's premises. He grew up in this family business. Over the past 5-6 months, he has been increasingly assisting with applicant's general operations and management. He also moved into applicant's neighborhood, plans to work full time for applicant and, in the near future, become a shareholder with Graciela Armas in the applicant corporation.

4. In 2018, applicant applied for a type-47 license that would permit it to retail in beer, wine, and distilled spirits for a bona-fide eating place at its premises at 55 Race Street, San Jose, California (hereafter applicant's premises).<sup>5</sup> Applicant would be replacing its type-41 license with the type-47 license. A. Votaw (hereafter Votaw), one of the Department's licensing representatives, investigated the type-47 license application on the Department's behalf. Based on her investigation, she recommended the application be denied based on the same grounds in the Statement of Issues.<sup>6</sup> Her recommendation was endorsed by her superiors.

5. Applicant currently operates applicant's premises as a Mexican restaurant in a single story free-standing building with a licensed patio area with a combined capacity of approximately 140 persons. Applicant's premises is located at the intersection of Race

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operated games. Condition 5 bans consumption of alcoholic beverages on adjacent property. Condition 6 bans bar or lounge areas. Condition 7 bans the sale of beer or wine for off-premises consumption. Condition 8 bans live entertainment, amplified music, karaoke or dancing. Condition 9 permits the sales, service and consumption of alcoholic beverages only between 8:00 a.m. and 10:00 p.m. daily. Condition 10 bans the exchange for a public premises license. Condition 11 requires sufficient lighting in the patio and that it not disturb the privacy of neighbors. Condition 12 requires alcoholic beverages be served in containers that are distinct and distinguishable from non-alcoholic beverages containers. Condition 13 requires the licensee or its employees to personally serve alcoholic beverages to the person who ordered the beverage or will be consuming it.

<sup>5</sup> Applicant obtained its type 47 on-sale general license by way of the Department's annual lottery conducted, if needed, to distribute added general licenses as permitted by law. Even if a general license was won in a lottery, the winner must still apply to the Department for issuance of the license at a specific location and otherwise qualify to hold that license.

<sup>6</sup> In the event applicant's type-47 license application were denied, applicant would retain its type-41 on-sale beer and wine bona-fide eating place license.

Street and Sierra Avenue on a somewhat triangular shaped parcel. One side of the applicant's premises faces Race Street and one side faces Sierra Avenue. The third side is adjacent to a residential property owned by either or both Jose and/or Graciela Armas. Applicant's menu is based on dishes from Jalisco, Mexico and family recipes. Its customers include local blue-collar workers and local residents. Applicant's open air patio is on the most northern portion of applicant's premises, closest to the intersection of Race Street and Sierra Avenue. It is an open-air patio enclosed by 3-4 foot tall decorative metal railing. Applicant's restaurant building is south of its patio.

6. Applicant desires a type-47 license because: its business has somewhat stagnated, it seeks to look for different avenues to expand its operation, and it could serve its customers certain alcoholic beverages from Mexico. However, applicant plans to remain a Mexican restaurant and close no later than 9:00 p.m. daily.

7. Applicant employs a combined full and part-time staff of approximately 15-20 people. It is essentially a family owned and operated business, not a franchise. It is open Monday through Saturday from 9:00 a.m. to 9:00 p.m. and Sunday 9:00 a.m. to 8:00 p.m.

8. Race Street near applicant's premises is primarily a commercial street with one north bound and one south bound lane traffic lane with parking lanes. It is busy with traffic during normal commute hours but otherwise not excessively busy. Sierra Avenue near applicant's premises is primarily a residential street with single family homes. It primarily runs southwest to northeast and intersects Race Street at an approximately 45 degree angle resulting in applicant's premises being on a triangular shaped parcel. Applicant's premises occupies the southwest corner Race Street and Sierra Avenue.

9. Applicant has its own parking lot. It faces Race Street and is south of applicant's premises building. It has approximately 27 parking spaces. There are no structures on the parking lot. There is an approximately 5-6 ft. high wall that separates it from adjacent residences. There are light poles on the parking lot.

10. On the northwest corner of Race Street and Sierra Avenue is a business known as Mexico Lindo Y. Cantina. It is licensed with a type 47-license, has a bar, has a dance floor, and is sometimes open until 2:00 a.m. No evidence was presented its operations disturbed the protestants or the local neighborhood.

11. Approximately 300 feet from applicant's premises is St. Leo the Great Catholic School at 1051 W. San Fernando Street, San Jose. Votaw sent notice to it regarding applicant's application but received no response from that school about the application.



12. Approximately 300 feet from applicant's premises is St. Leo the Great Catholic Parish at 88 Race Street, San Jose. Votaw sent notice to it regarding applicant's application but received no response from that parish about the application.

13. Approximately 100 feet from applicant's premises was the Family Resource Center at 46 Race Street, San Jose. Votaw sent notice to that facility regarding applicant's application but received no response from it about the application. The evidence did not indicate what kinds of activity primarily occurred at that facility.

14. No public playgrounds, other churches, other schools, or youth facilities were shown to be within 600 feet of applicant's premises.

15. Applicant's premises is in census tract 5006.00. Applying the standards set forth in section 23958.4 concerning the concentration of on-sale retail licenses, applicant's census tract allows 5 on-sale retail licenses and 15 have already been issued in that census tract. The Department's report on application indicated applicant already signed an ABC-231 that will cancel its type-41 license in the event the type-47 license is issued. If that occurred, the number of on-sale retail licenses in applicant's census tract would not change.

16. Applying the criteria set forth in section 23958.4 for what constitutes a high-crime reporting district, the average number of crimes and arrests per police reporting district for the City of San Jose was 483. Applicant's premises was in reporting district F4 which had a crime/arrest count 484. Under section 23958.4, applicant's reporting district was not deemed a high crime reporting district because the crimes/arrest was not 120% or more of the average for all San Jose police reporting districts.

17. Votaw contacted the San Jose Police Department (hereafter SJPD) regarding applicant's application. SJPD Sgt. Galea conveyed to Votaw the SJPD was neutral on the application so long as the hours limiting the sales, service, and consumption of alcoholic beverages remained the same as on applicant's type-41 license, i.e., 8:00 a.m. to 10:00 p.m. daily. SJPD also informed Votaw that in the past twelve months there were no alcoholic beverage related calls for service to applicant's premises. The three calls for service to applicant's premises consisted of: a call for a man with a taser, a call for a stolen bicycle, and a call for an aggressive panhandler.

18. Applicant asserted it would not cause any disturbance to nearby residents. Applicant indicated it renovated the lights in its parking lot, increased staff trainings and meetings, posted signs requesting patrons use its parking lot, and had more frequent outdoor cleaning. Applicant pledged to neither have any live music nor increase its hours of operation.

19. Applicant submitted a letter regarding what public convenience or necessity it would provide with a type-47 license. Votaw testified applicant's letter indicated the license would allow applicant to serve its customers an array of alcoholic beverages from Mexico.<sup>7</sup>

20. There were 15 residences within 100 feet of applicant's premises or its parking lot as follows:

|     |                       |  |
|-----|-----------------------|--|
| 1.  | 1135 Yosemite Ave.    | approx. 18 ft. south of parking lot      |
| 2.  | 1155 Yosemite Ave.    | approx. 90 ft. south of parking lot      |
| 3.  | 1115 Sierra Ave.      | approx. 55 ft. northwest of premises     |
| 4.  | 1127 Sierra Ave.      | approx. 55 ft. northwest of premises.    |
| 5.  | 1139 Sierra Ave.      | approx. 55 ft. northwest of premises     |
| 6.  | 1150 Sierra Ave.      | approx. 10 ft. south of premises.        |
| 7.  | 1151 Sierra Ave.      | approx. 60 ft. northwest of premises     |
| 8.  | 1162 Sierra Ave.      | approx. 55 ft. southwest of premises.    |
| 9.  | 1163 Sierra Ave.      | approx. 80 ft. west of premises          |
| 10. | 1174 Sierra Ave.      | approx. 60 ft. northwest of parking lot  |
| 11. | 1184 Sierra Ave.      | approx. 20 feet northwest of parking lot |
| 12. | 1194 Sierra Ave.      | approx. 60 west of parking lot           |
| 13. | 1049 Garland Ave., #1 | approx. 80 ft. southeast of premises     |
| 14. | 1049 Garland Ave. #2  | approx. 80 ft southeast of premises      |
| 15. | 46 ½ Race St.         | approx. 50 ft. east of premises          |

21. Under its type-41 license, applicant suffered two prior accusations. Under reg: 14080070, applicant suffered an accusation for violation of condition #1 on its license banning exterior advertising of alcoholic beverages.<sup>8</sup> According to the accusation, those violations occurred on November 14, 2013 and January 28, 2014. Under reg: 20089770, applicant suffered an accusation for violation of condition #8 on its license that forbids live entertainment, amplified music, karaoke or dancing.<sup>9</sup> According to the accusation, those violations occurred on July 5, 2019 and August 1, 2019 and both dates involved

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<sup>7</sup> A copy of that letter was not submitted as an exhibit.

<sup>8</sup> Condition #1 states: "There shall be no exterior advertising of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages."

<sup>9</sup> Condition #8 stated: "There shall be no live entertainment, amplified music, karaoke, or dancing permitted on the premises at any time."

having amplified music on the licensed premises. Both accusations were resolved resulting in final disciplinary decisions.

22. In 2013 and 2018, applicant petitioned the Department to remove condition #8 that forbids live-entertainment, amplified music, karaoke, and dancing on the licensed premises. The Department denied both requests and that condition remains on applicant's type-41 license.

23. Votaw made approximately 11 visits to applicant's premises and/or the surrounding area as part of her investigation. She did not witness any disturbing noise coming from applicant's premises. She did notice a conspicuous banner posted on applicant's fencing promoting applicant's premises and testified it stated, among other things, "Come Party on Our Patio." She did not observe any unruly behavior or unusual volume of litter. She did see a sign asking applicant's patrons to use its parking lot. It appeared the lamp post(s) in the parking lot was/were not fully functional. She did see some patron tables and chairs set up adjacent to the licensed premises and testified applicant should have sought a special permit from the Department to do that. Ultimately, she recommended the application be denied based on applicant's inability to adhere to license conditions based on its disciplinary history in addition to the existence of 15 residences within 100 feet of applicant's premises or its parking lot. Her recommendation was endorsed by her supervisors.

24. Protestant Gaffney has resided at 1163 Sierra Avenue, which is approximately 80 feet from applicant's premises, for approximately 15 years. When he moved there, applicant's premises was operating as a restaurant and he did not initially experience it to be noisy or cause any disturbance to the neighborhood. However, he noticed disturbing activity began after Graciela and Jose Armas took over its operation. Sometimes crowds would occupy the patio area causing noise and patrons parked their cars on Sierra Avenue and socialized there disturbing the neighborhood's peace. In June 2019, he video recorded a mariachi band performing on applicant's patio. He has complained, primarily over excessive noise, to the Armases, to the SJPD, and used the "311" call line for the City of San Jose, but the disturbances continued. However, since June 2019, applicant's premises operations have been somewhat quieter. On the day prior to the hearing, he observed a sidewalk sign board on Race Street (Exhibit P-2) adjacent applicant's premises that seemingly offered alcoholic beverages at applicant's premises in apparent violation of one of applicant's type-41 license conditions. Exhibit P-2 was a photo of the A-frame sign-board. It appeared approximately 4' tall by 30" wide, appeared professionally produced, had applicant's business name prominently printed on it, and the names and images of the following drinks: "Michelada", "Chavela", "Wine Sangria", "Margarita", and "Agua loca". Protestant Gustavo Fernandez testified "Agua loca" meant "crazy-water".

25. Protestants Gustavo and Elena Fernandez reside at 1135 Yosemite Avenue. Their house is south of and adjacent to applicant's Race Street parking lot. During the period of 2012-2014, when their house was being renovated, people jumped over the parking lot wall and burglarized their house. In February-March 2021, an apparent homeless couple camped on applicant's parking lot immediately adjacent to the wall that separates the parking lot from the Fernandez home. They tossed litter over the wall onto the Fernandez property. Gustavo Fernandez complained to applicant as the couple were camping on applicant's parking lot. Elena Fernandez testified Graciela Armas told her she reported the encampment to the Sheriff's Department who told her they were not moving homeless persons due to Covid-19. The couple camped in the parking lot no less than four weeks before they moved on. Elena Fernandez also testified that last summer there was some kind of social event held in applicant's parking lot where drinks were being sold and consumed.<sup>10</sup> Gustavo Fernandez also testified that there is litter upon applicant's property. He also recently saw a sidewalk sign board next to applicant's premises advertising what he believed were alcoholic beverages at the licensed premises contrary to applicant's current license condition forbidding such advertising.

26. On behalf of applicant, John Armas testified applicant intends to continue operation as a Mexican restaurant for the indefinite future. Applicant considers itself part of the neighborhood, not only as a local business but also as a landowner. John Armas intends on becoming more involved in the operation of applicant's premises with his mother, Graciela. As part of the divorce agreement between Jose Armas and Graciela Armas, Jose will discontinue his participation at applicant's premises.

27. John Armas made contact with the homeless couple who camped out in a corner of applicant's parking lot and tried to persuade them to leave voluntarily. He also called SJPd but they would not take any action to forcibly remove them due to Covid-19 considerations. After a few weeks, the couple moved away on their own.

28. To address litter, applicant has a weekly gardening service that clears litter and applicant's employees also clear litter/trash they find. However, John Armas testified that due to a nearby bus-stop and public trash can, sometimes homeless persons cause litter to spread onto applicant's property.

29. Applicant responded to neighbors' complaints concerning an unsightly storage shed on applicant's property. Applicant renovated the shed. Also, in response to neighbors' complaints made about applicant's gardener using noisy leaf blowers in the early morning,

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<sup>10</sup> Applicant's parking lot was not licensed for the sales, service, or consumption of alcoholic beverages.

applicant directed the gardener to do any leaf-blowing no earlier than 8:30 a.m., prior to applicant's regular 9:00 a.m. opening time. Applicant also disconnected all speakers in the outdoor patio and has no live music there either. However, on one occasion, a mariachi band was permitted to perform on the patio to celebrate the anniversary of one of applicant's long-term employees.

30. Applicant did permit usage of the parking lot for a school related fund-raiser where drinks were served. It also supports local Catholic churches and schools in the area.

31. Applicant offered to provide a cellphone number to neighbors so they could call applicant to address concerns about applicant's premises or its operations.

### **LEGAL BASIS OF DECISION**

1. Article XX, section 22, of the California Constitution delegates the exclusive power to license the sale of alcoholic beverages in California to the Department of Alcoholic Beverage Control.

2. In a protest matter, the applicant bears the burden of establishing it is entitled to the applied for alcoholic beverage license from the start of the application process until the Department makes a final determination.<sup>11</sup> However, a protestant has his/her own burden of establishing the merits of their protest to warrant denial of the application.

3. Section 23958 requires the Department conduct a thorough investigation to determine, among other things, if the applicant and the proposed 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, the Department shall deny an application for a license if the applicant or the premises do not qualify for a license under the Act. It further provides the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4.

4. Under section 23958.4, subdivisions (a) and (b), and applying the criteria for over-concentration of licenses set forth therein, if 1) issuance of a type-47 bona-fide eating place license would create or add to an undue concentration of on-sale licenses and/or 2) applicant's premises is in a high-crime reporting district, then either one or both situations are cause for denying the application. However, under section 23958.4,

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<sup>11</sup> *Coffin v. Alcoholic Beverage Control Appeals Board* (2006) 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420.

subdivision (b), the department may issue an added license if, depending on the type of license applied for, either the department or a local governing body, as specified therein, determines public convenience or necessity would be served by issuance of the applied for license. In in case of an on-sale retail bona-fide eating place license, such as a type - 47 license, the Department, not the local governing body, determines if issuance of the license would serve public convenience or necessity.

5. Under section 23789, subdivision (a): “The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within the immediate vicinity of churches and hospitals.”

6. Under section 23789, subdivision (b): “The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within at least 600 feet of schools and public playgrounds or nonprofit youth facilities, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls. This distance shall be measured pursuant to rules of the department.”

7. Section 23800 states: “The department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges in the following situations: (a) If 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. (§...§)”

8. Under section 24015, subdivision (g): “If the person filing the request for a hearing fails to appear at the hearing, the protest shall be deemed withdrawn.”

9. Under California Code of Regulations, title 4, section 61.4 (hereafter rule 61.4), no original issuance of a retail license or premises-to-premises transfer of a retail license shall issue if there are residences within 100 feet of the applicant’s premises or within 100 feet of the parking lot which is maintained for premises patrons or operated in conjunction with the premises. However, another retail license, such as a type-47 license, can be issued if applicant establishes to the Department that operation of the business with that license would not interfere with the quiet enjoyment of the property by those residents.

### **DETERMINATION OF ISSUES**

1. The Department recommended the application be denied primarily on the two grounds set forth in its Notice of Denial and Statement of Issues. Firstly, it contended applicant suffered two prior disciplinary accusations under its type-41 license. Exhibit D-3 established that under reg: 14080070 applicant suffered an accusation for violation of

condition #1 for the improper advertising of alcoholic beverages. The violations therein occurred on November 14, 2013 and January 28, 2014. Exhibit D-5 established that under reg: 20089770 applicant suffered an accusation for violation of condition #8 that bans live entertainment, amplified music, karaoke, or dancing on the licensed premises. The violations occurred on July 5, 2019 and August 1, 2019 and involved having amplified music on the licensed premises. Both accusation matters were final. Therefore, the evidence established applicant violated conditions on its type 41 license on four separate dates as specified in the two accusations.

2. However, the evidence also established that within a few weeks prior to the administrative hearing in this matter, a professionally appearing sign-board was set up on the sidewalk next to the licensed premises. (Exhibit P-2: photo of sign-board) It had the name "La Cazuelas Restaurant" printed on it. It also listed various drinks, i.e., Margarita, Michelada, Chavela, Wine Sangria, and Agua loca along with images of those beverages. It was apparent this advertising board was not in compliance with either the letter and/or spirit of condition #1 on applicant's type-41 license that states:

There shall be no exterior advertising of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages.

At the very minimum, the offering of a wine sangria was an exterior advertisement for an alcoholic beverage. Also, a margarita is commonly recognized to refer to an alcoholic beverage. It could also be easily inferred that a drink called "Agua loca", meaning "crazy-water", referred to an alcoholic beverage. Applicant's argument at the hearing these all could have been advertising non-alcoholic beverages defies common sense. Applicant presented no evidence the sign board advertised exclusively non-alcoholic beverages it actually served and sold at its premises under those specific names. Applicant provided no reasonable explanation why such an exterior alcoholic beverage advertisement was used contrary to condition #1 on its license.

3. Also, protestant Gaffney video recorded a mariachi band performing on applicant's patio on or about June 1, 2019. (Exhibit P-1: video clip). At that time, applicant's type-47 application was still under investigation by Votaw. Applicant explained the band's performance was only an hour or two as part of the celebration of the anniversary of one of its long-term employees. However, the band's live performance was live-entertainment and occurred contrary to condition #8 on applicant's type-41 license that states:

There shall be no live entertainment, amplified music, karaoke, or dancing permitted on the premises at any time.

Applicant's explanation the band was performing to help celebrate an employee's anniversary was neither a defense to violating this condition nor a basis of mitigation.<sup>12</sup>

4. During the course of the investigation for the type-47 license, Votaw saw a banner prominently displayed on applicant's fence that said, among other things, "Come Party on Our Patio" or "Come Party on the Patio" (Exhibit D-6e: photo of banner) While the banner may not have expressly violated any specific condition on applicant's type-41 license, it certainly seemed to invite or solicit the precise type of behavior, activity or conduct that could easily be disruptive to the nearby residential neighbors and seriously undermined applicant's assertion that if licensed with a type-47 license it will operate so as to not disturb its residential neighbors.

5. Also during her investigation, Votaw saw tables and chairs set out for patrons that were in an outdoor area adjacent to but not part of the licensed premises building or patio. Votaw testified applicant had not received any permit or permission from the Department to have patron seating areas beyond the existing licensed premises. Votaw's report indicates that on a subsequent inspection the tables and chairs were removed from the unlicensed area.

6. Considering the advertising sign board, the performing mariachi band, the banner, the unpermitted seating areas, and the prior formal accusations for violating license conditions, when taken as a whole, defeats applicant's claim it is qualified or entitled to be issued a type-47 general license at the applied for premises. This is not a situation remedied by the imposition of operational conditions or restrictions on the type-47 license as allowed by section 23800. Applicant has attempted to address certain problems brought to its attention. Nonetheless, considering applicant's performance record to date as a type-41 licensee, granting applicant a license with an even broader range of retail privileges for alcoholic beverages is not appropriate in this instance.<sup>13</sup>

7. The Department also alleged in its Statement of Issues that, within the meaning of California Code of Regulations, title 4, section 61.4 (hereafter rule 61.4), there were 15 residences within 100 feet of applicant's premises or its parking lot. Rule 61.4 states no original retail license shall issue if there are residences with 100 feet of applicant's

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<sup>12</sup> The Report on Application, Exhibit D-7, indicated the Department filed an accusation related to this incident, but there was no evidence presented related to the status or disposition of that case.

<sup>13</sup> This conclusion is reached even though if the type-47 license is denied, applicant can continue using its type-41 license subject to the 13 conditions on that license.



premises or within 100 feet of the parking lot which is maintained for premises patrons or operated in conjunction with premises. In this instance, the evidence established there were no less than 15 residences within 100 feet of applicant's premises or its parking lot.<sup>14</sup>

8. However, under rule 61.4, the Department may issue the applied for retail license if "applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents." Section 23800 indicates the Department may place reasonable conditions upon retail licenses if grounds exist for denial of an application or where protest against issuance of a license is filed and the department finds those grounds may be removed by the imposition of those conditions.

9. Protestants established some actions, activities, and occurrences that involved the licensed premises or its parking lot have directly disturbed the quiet enjoyment of their residences. Applicant asserted that if licensed with a type-47 license, it: will not interfere with its neighbors quiet enjoyment of their homes, will control litter, will remain a restaurant, will limit alcoholic beverages to no later than 9:00 p.m., and will be responsive to neighbors' concerns. Applicant did not expressly offer all 13 conditions on its type-41 license be imposed on its type-47 license. In fact, applicant has twice sought to remove condition #8, that bans live entertainment, amplified music, karaoke and dancing, from its type-41 license. Applicant did not indicate it would agree this condition be carried over to the type-47 license. Based on these considerations in combination with the finding above that applicant is not qualified to hold the applied for type-47 license and despite what conditions applicant suggested be affixed to its type-47 license, it is determined applicant did not sufficiently establish issuance of a type-47 license to it would not interfere with the quiet enjoyment of nearby residents of their homes within the meaning of rule 61.4. Therefore, the application should be denied as specified in rule 61.4.

10. As to the protest by Brett Frazier, under section 24015, subdivision (g), if a protestant requests a hearing on their protest but does not appear at the hearing then their protest is deemed withdrawn. As protestant Brett Frazier requested a hearing on his protest but did not appear at the hearing, his protest is deemed withdrawn.

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<sup>14</sup> Although one of the fifteen residences is owned by applicant or one or more of the Armases as a rental house, rule 61.4 also encompassed that residence.

11. As to the protests of those who appeared at the hearing, they collectively opposed issuance of the license because they contended it would result in interference with the enjoyment of their homes for the reasons addressed below.<sup>15</sup>

12. Protestants contended issuance of the license would create or result in homeless persons in the area. Votaw did not witness any homeless or particularly disruptive or unruly persons in or around applicant's premises during her inspections. A homeless couple recently camped in a corner of applicant's parking lot for approximately four weeks. During that time, they tossed litter over a wall onto the Fernandez property. Applicant attempted to address the problem by requesting or directing that couple to vacate the parking lot. Applicant also called SJPD for assistance but was told they were not moving homeless encampments based on Covid-19 considerations. Ultimately, the couple moved on their own after a few weeks. There was insufficient evidence establishing issuance of the applied for license would tend to cause more homeless persons to camp or loiter on applicant's premises or its parking lot.

13. Protestants asserted issuance of the license could or would result in added noise in the area. There was testimony some of applicant's patrons would park on the local residential streets and talk or socialize at or near their cars going to/from applicant's premises to a degree that disturbed some residents. Some noise also came from those using applicant's open air patio and from applicant's gardeners using noisy leaf-blowers in the early morning hours. Applicant indicated it had disconnected all patio speakers and directed its gardeners to not use their leaf blowers until at least 8:30 a.m., just prior to applicant's 9:00 a.m. opening. However, applicant had a banner posted that invited potential patrons to "party" on its patio. Applicant did permit noise generating live entertainment on its patio contrary to a condition on its license. The patio remains open-air and is within 100 feet of several residences. There is no barrier, such as a wall or fence, that prevents or re-directs noise generated in the patio from flowing into the adjacent residential area. A type-47 license permits the sales, service, and consumption of beer, wine and distilled spirits and could be used to facilitate a bar or lounge area for patrons' socializing. A type-47 license would permit applicant retailing a stronger form of alcoholic beverages, to wit: distilled spirits, such as tequila, whisky, rum, and vodka. Under the current set of circumstances, issuance of the applied for license could lead to further noise related disturbances for applicant's local neighbors. Therefore, the protest as to noise is sustained.

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<sup>15</sup> The protestants did not file identical protests, so the decision will address the various topics collectively raised in the protests of those protestants who requested a hearing in accordance with section 24105, subdivision (d).

14. Protestants asserted issuance of the applied for license would create, add to, or result in added litter in the area. The evidence established some litter was in applicant's parking lot area. Applicant indicated its weekly landscaping service clears litter they find and applicant's staff will remove litter it finds. Applicant indicated some litter may end up on their property due to the activity of homeless persons in the area. It did not seem applicant's premises would be the source of excessive added litter if licensed with a type-47 license.

15. Protestants claimed issuance of the license would create or result in public urination in the area. No evidence was presented this activity occurred to a significant degree since applicant has held its type-41 license at applicant's premises. The evidence did not establish it would become any more frequent an occurrence if the applied for license were issued.

16. Protestants alleged issuance of a type-47 license to applicant would create or add to an undue concentration of licenses in the area. Exhibit 7, the report on the application, stated applicant had signed an ABC-231 form that would cancel applicant's type-41 license in the event the applied for type-47 license were issued. Therefore, as issuance of a type-47 license to applicant would not increase the number of active on-sale retail licenses in applicant's census tract, issuance of the type-47 license would neither result in nor add to an over-concentration of on-sale retail licenses in applicant's census tract as described in section 23958.4.<sup>16</sup> Protestants' claim of over concentration of licenses was not a ground to deny the application as described sections 23958 and 23958.4.

17. Additionally, aside and apart from section 23958.4's specific criteria and definition regarding what constitutes over-concentration of on-sale retail licenses by census tract, the evidence did not establish there already was an excessively high number of on-sale retail licensees in the general area of applicant's premises. Therefore, it was not shown that, even in a generic sense and regardless of census tract boundaries, issuance of the applied for license would add to or result in an excessive number of on-sale retail licenses in the immediate or general vicinity of applicant's premises.

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<sup>16</sup> Also, with respect to 23958.4, because the number of on-sale retail licenses in the census tract would remain the same, applicant was not required to establish that issuance of the license would serve public convenience or necessity.

### CONCLUSION

1. In a license application such as this, applicant has the ultimate burden to establish it is entitled to issuance of the license. Both applicant and applicant's premises must qualify for the license. Under rule 61.4, if there are residents within 100 feet of applicant's premises or its parking lot a retail license application should be denied unless applicant can show that, if licensed as requested, operation of "the business would not interfere with the quiet enjoyment of the property by residents." As discussed above, applicant's overall performance history under its type-41 license included not only formal disciplinary actions but recent acts and activities that were contrary in letter and/or spirit to its current set of license conditions. Also, as described above, there are 15 residences within 100 feet of applicant's premises or its parking lot. The protestants presented evidence applicant's operation has actually disturbed the quiet enjoyment of their homes in the past. Applicant did not sufficiently establish that if issued a type-47 license, operation of its business would not interfere with the quiet enjoyment of those residences with 100 feet of the premises or its parking lot as required under rule 61.4. Based on these considerations, applicant has not demonstrated by a preponderance of the evidence that it and the applied for premises are qualified to be issued a type-47 on-sale general license. Therefore, applicant has not shown it is entitled to the agency action sought and the application should be denied.

2. As to the evidence presented by the protestants in support of their collective grounds for protest, as described above, their objection based on undue noise was established. There was insufficient evidence to sustain their other protest grounds.


### ORDER

1. Applicant's petition and application for issuance of a type-47 license at the applied for premises is denied.
2. The protests of Chris Gaffney, Elena Fernandez, and Gustavo Fernandez is sustained over the noise objection but not sustained as to any other protest grounds.
3. The protest of Brett Frazier is withdrawn.

Dated: September 11, 2021



David W. Sakamoto  
Administrative Law Judge

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| <input checked="" type="checkbox"/> Adopt  |
| <input type="checkbox"/> Non-Adopt: _____  |
| By: <u></u> |
| Date: <u>11/24/21</u>  |