

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

AB-9944

File: 47-533936; Reg: 21091167

PHANTOM LOUNGE and NIGHTCLUB, LLC,
dba Phantom Lounge
1014 5th Avenue, Suite 140
San Diego, CA 92101,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: May 13, 2022
Sacramento, CA

ISSUED MAY 16, 2022

Appearances: *Appellant:* James Goro, *in propria persona*, on behalf of Phantom Lounge and Nightclub, LLC,

Respondent: Jason T. Liu, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Phantom Lounge and Nightclub, LLC, doing business as Phantom Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ denying its petition to remove and modify conditions on its current type-47 on-sale general eating place license (petition).

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on April 14, 2014. There are three instances of prior departmental discipline against the license in 2015, 2017, and 2018. (Finding of Fact (FF) ¶ 11.)

At the time of appellant's Petition for Conditional License (PCL), its petition acknowledged (in its whereas clauses) that there was a protest filed against the issuance of the license by the San Diego Police Department (SDPD), and several findings that were grounds for either the outright denial of the license application, and/or grounds for the imposition of conditions, if a license were to issue. (Exh. 8.) Ultimately, the license was issued with the following conditions to address the concerns noted in the whereas clauses:

1. Sales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 1:30 a.m. each day of the week.
2. The quarterly gross sales of alcoholic beverages shall not exceed the quarterly gross sales of food during the same period. 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. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.
3. The sale of alcoholic beverages for consumption off the premises is strictly prohibited.
4. Live entertainment on the premises shall be limited to a disc jockey. Said entertainment shall be permitted only between the hours of 11:00 a.m. and 10:00 p.m. Sunday through Thursday, and 11:00 a.m. and 1:30 a.m. Friday and Saturday. Live music, karaoke, topless entertainment, male or female performers or fashion shows are prohibited.
5. No pool or billiard tables may be maintained on the premises.
6. There shall be no amusement machines or video game devices in the premises at any time.

7. Petitioner(s) shall not share any profits, or pay any percentage or commission to a promoter or any other person, based upon monies collected as a door charge, cover charge, or any other form of admission charge, including minimum drink orders or the sale of drinks.

8. The sound(s) including but not limited to loudspeakers, television, sound systems, or any other types of music noise from the operation of the business shall not be audible from the exterior of the premises in any direction, including above the premises as depicted on the ABC-257 Licensed Premises Diagram, dated 05/10/13 and the ABC-253 Supplemental Diagram dated 05/10/13.

A modification of the PCL, in November 2020, was granted by the Department to remove a restriction on charging a cover charge.

In appellant's current petition, it seeks to: modify condition one, to extend the sales, service, and consumption of alcoholic beverages from the current hours to 6 a.m. to 2:00 a.m. each day of the week; modify condition two, so that the percentage is 30% or more food and no more than 70% alcohol sales; and remove condition four completely, to allow live entertainment without limitation. (Exhibits D-3 and D-4.)

The Department conducted an investigation to determine whether the petition should be granted. Following that investigation, the investigator recommended that the request for modifications and removal of conditions be denied because the circumstances that led to the imposition of those conditions still exist.

At the administrative hearing held on August 31, 2021, documentary evidence was received and testimony concerning the petition and investigation was presented by Department Licensing Representative Maritza Gonzalez; SDPD crime analyst Jordan Fankhouser; SDPD Detective Andrea Wood; and Department Supervising Agent Melissa Ryan. James Goro, owner and corporate officer of appellant Phantom Lounge and Nightclub, LLC testified on its behalf.

Testimony established that the licensed premises is located in downtown San Diego in a mixed-use residential and commercial zone. It is located in census tract 0053.00 which contains 139 on-sale licenses. This is well above the eight licenses that would normally be supported by the population density, thereby constituting overconcentration. (FF ¶ 5; Exhs. D-4 through D-7.) The SDPD protested the modification of conditions based on overconcentration of licenses, high crime, and concern that elimination or modification of conditions would aggravate existing law enforcement problems. (FF ¶¶ 8, 9.) Written opposition from a nearby resident expressed concern about noise levels already being too high. (FF ¶ 10.)

Appellant presented evidence purporting to show that not all premises in the census tract are subject to the same restrictions as those imposed on appellant's license. The Department investigated this concern, and in its report noted that the type-47 establishments surrounding appellant's premises are, in fact, subject to the same or more restrictive hours of operation and the same ratio of alcohol versus food sales. A significant number of these other establishments are not permitted to have live entertainment. (FF ¶ 13.)

The administrative law judge (ALJ) issued a proposed decision on September 13, 2021, recommending that the petition be denied. The Department adopted the proposed decision in its entirety on November 24, 2021, and a certificate of decision was issued six days later.

Appellant then filed a timely appeal contending that the Department and SDPD have not been fair in their decisions, and that the police did not protest against other licenses in the same census on the basis of crime and over-saturation of licenses. In short, it contends it has received disparate treatment.

Written notice of the opportunity to file briefs in support of appellant's position was given on February 11, 2022. Appellant's opening brief was originally due March 3, 2022. No brief was filed, but appellant indicated he was hiring legal counsel, thereby necessitating an extension of the briefing schedule. Accordingly, the deadline for filing the opening brief was extended to March 30, 2022. Thereafter, however, the opening brief was submitted by appellant *in pro per*, rather than by legal counsel.

DISCUSSION

We have reviewed appellant's opening brief and its notice of appeal, but neither document provides sufficient information for the Board to determine the basis for its appeal — other than the fact that it disagrees with the Department's decision and feels other licensees have received more favorable treatment.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was appellant's duty to show the Board that some error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710]; *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880].) To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Appellant has not offered any such analysis. Where a point is merely asserted without any argument or support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].)

Appellant's only articulated complaint is that it received disparate treatment from that of other licensees in the same census tract. We have reviewed the entire record on this point and disagree with appellant's characterization of the facts.

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].)

Business and Professions Code section 23803 provides, in pertinent part:

(a) The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, **if it is satisfied that the grounds that caused the imposition of the conditions no longer exist**, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. The department may not remove or modify any condition to which an objection has been filed without holding a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) 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.

[¶ . . . ¶]

(Bus. & Prof. Code § 23803, emphasis added.)

Appellant’s contention is addressed at length in the decision, explaining fully both the rationale and facts underlying the determination that appellant did not receive disparate treatment compared to other licensees:

5. In precedent decision *PAON Carlsbad LLC Db a 83 Degrees* (2018) 18-01-E, the Department director considered the issue of whether differing conditions in facially comparable licenses, alone, were a sufficient basis to justify a modification of conditions. In rejecting this conclusion, the Department director noted:

"The fact that the Department has recently issued licenses without the hours-restriction condition sought to be modified here, including two licenses issued during the pendency of this matter, is another such circumstance. That said, the fact that other nearby licenses were issued with different hours restrictions than the license here is, without more, not a justification to remove or modify the condition given that each application is evaluated independently."

This precedent decision established that this circumstance is but one of many factors to be considered in determining whether the Petitioner has met its burden of proof. The precedent decision went on to note 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."

6. In this matter, the Petitioner has argued that the Licensed Premises has been singled out for disparate treatment and that the opposition to the condition modifications is without merit based on differing conditions in facially comparable licenses. The evidence received in this matter established that there are multiple comparable businesses that have similar, or even more restrictive, conditions as the Petitioner. The evidence also supported the Department's position that these conditions were specifically tailored to limit the impact on law enforcement, and limit public welfare and morals violations caused by the high concentration of licenses in the area. The Petitioner, in presenting evidence of "comparable" license holders that were granted condition modification relief, also failed to address whether these other licensed establishments had the same extensive record of serious license violations that have been sustained against the Petitioner. Since its licensure in 2014, the Petitioner has had three sustained disciplinary incidents against its license. All three involved non-compliance with the existing conditions on the license at issue. The Petitioner has failed to establish that disparate treatment has occurred in this matter. (Findings of Fact, ¶¶ 1-13)

(Conclusions of Law, ¶¶ 5-6.) We agree with this analysis and conclusion.

Appellant bore the burden of proof at the administrative hearing to present evidence establishing that the grounds that caused the imposition of the conditions in the first place no longer exist. The Department found that appellant did not meet this burden of proof, and that the circumstances which necessitated the imposition of conditions in 2014 and 2020 still exist.

We find no error in the decision.

ORDER

The decision of the Department is affirmed.²

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

² 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:

PHANTOM LOUNGE AND NIGHTCLUB, LLC
PHANTOM LOUNGE
1014 5TH AVENUE, SUITE 140
SAN DIEGO, CA 92101

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

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

SAN DIEGO DISTRICT OFFICE

File: 47-533936

Reg: 21091167

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.

Sacramento, California

Dated: November 30, 2021

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NOV 30 2021

**Alcoholic Beverage Control
Office of Legal Services**



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE PETITION OF:

Phantom Lounge and Nightclub, LLC
dba: Phantom Lounge
1014 5th Avenue, Suite 140
San Diego, California 92101

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

Under the Alcoholic Beverage Control Act

} File: 47-533936
}
} Registration: 21091167
}
} License Type: 47
}
} Word Count: 26,448
}
} Reporter:
} Zoanne Williams-CSR #7626
} iDepo Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on August 31, 2021.

John Newton, Jason Liu, and Lisa Wong, Attorneys, represented the Department of Alcoholic Beverage Control (Department).

James Goro, an owner and corporate officer of Phantom Lounge and Nightclub, LLC was present and represented the Petitioner in this matter (Petitioner).

The Petitioner seeks to remove or modify certain 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. The Department denied the Petitioner's request, after which the Petitioner requested a hearing. (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued on August 31, 2021 and submitted for decision on that date.

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

FINDINGS OF FACT

1. The Department issued a type 47, on-sale general eating place license to the Petitioner for the above-described location (the Licensed Premises) on April 14, 2014. Conditions were attached to the type 47 license that are currently applicable to the Licensed Premises and three of these conditions are the subject of this petition. (Exhibits D-1, D-2, and D-4)
2. The original petition for conditional license (PCL) noted that there was a protest filed against the issuance of the sought license by the San Diego Police Department (SDPD). The petition noted a number of findings that were grounds for the outright denial of the license application and that were also grounds for the imposition of conditions if a license were to issue. These grounds included the location of residences within 100 feet of the Licensed Premises, an undue concentration of licenses in the census tract pursuant to section 23958.4, the Licensed Premises' location within a high crime area pursuant to section 23958.4(c), and a consideration point within 600 feet of the Licensed Premises². An earlier modification of the PCL was granted by the Department that removed a restriction on charging a cover charge. This occurred in November 2020. The remaining conditions identified in the original PCL remained. (Exhibit D-8)
3. The type 47 license accepted by the Petitioner that issued in November 2020 had 8 conditions that were recommended by the Department to address the substantiated concerns identified in the protest or observed during the Department's investigation of the type 47 license application. The conditions were as follows:
 1. Sales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 1:30 a.m. each day of the week.
 2. The quarterly gross sales of alcoholic beverages shall not exceed the quarterly gross sales of food during the same period. 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. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.
 3. The sale of alcoholic beverages for consumption off the premises is strictly prohibited.
 4. Live entertainment on the premises shall be limited to a disc jockey. Said entertainment shall be permitted only between the hours of 11:00 a.m. and 10:00 p.m. Sunday through Thursday, and 11:00 a.m. and 1:30 a.m. Friday and Saturday. Live music, karaoke, topless entertainment, male or female performers or fashion shows are prohibited.
 5. No pool or billiard tables may be maintained on the premises.
 6. There shall be no amusement machines or video game devices in the premises at any time.
 7. Petitioner(s) shall not share any profits, or pay any percentage or commission to a promoter or any other person, based upon monies collected as a door charge, cover

² The church that led to the consideration point finding is no longer within 600 feet of the Licensed Premises and, as such, was not considered a factor as to whether the challenged conditions should remain or be modified.

charge, or any other form of admission charge, including minimum drink orders or the sale of drinks.

8. The sound(s) including but not limited to loudspeakers, television, sound systems, or any other types of music noise from the operation of the business shall not be audible from the exterior of the premises in any direction, including above the premises as depicted on the ABC-257 Licensed Premises Diagram, dated 05/10/13 and the ABC-253 Supplemental Diagram dated 05/10/13.

4. The Licensed Premises operates under the business name "Phantom Lounge" in the historic downtown of San Diego, California just north of the Gaslamp District. The Petitioner originally accepted the above 8 conditions in 2014 and again in 2020 when the PCL was modified. The Petitioner is currently exercising privileges pursuant to this type 47 license with the conditions described. The Licensed Premises has a business entrance facing 5th Avenue, a two way thoroughfare with entrances to multiple parking garages. 5th Avenue is lined by businesses at the street level on the block containing the Licensed Premises and on adjacent blocks. The building containing the Licensed Premises and two adjacent buildings on 5th Avenue and 4th Avenue, have multiple apartment units on the upper floors that fall within 100 feet of the Licensed Premises and the parking garage to the Licensed Premises building. (Exhibits D-4 through D-7)

5. The Department's investigation established that there are currently 139 on-sale licenses in Census Tract 0053.00 which contains the Licensed Premises. This overconcentration is well above the eight on-sale licenses that would normally be supported by the population density in this tract. The Licensed Premises is located in a mixed use zone. The City of San Diego Master Plan for the downtown area containing the Licensed Premises allows for commercial businesses on the street level and residential units on the upper floors above the businesses. As noted above, there are occupied residences above multiple businesses in the immediate area, including multiple residences within 100 feet of the Licensed Premises. (Exhibits D-4 through D-7)

6. On November 12, 2020, the Petitioner submitted to the Department a petition to modify or remove conditions from the type 47 license. The Petitioner sought the following changes:

- Have condition 1 modified to extend the sales, service, and consumption of alcoholic beverages from the current limit to 6 a.m. to 2:00 a.m. each day of the week.
- Have condition 2 modified so that the percentage is 30% or more food and no more than 70% alcohol sales. The current distribution of alcohol to food sales in the PCL establishes that the quarterly gross sales of alcoholic beverages shall not exceed the quarterly gross sales of food during the same period.
- Remove condition 4, which imposes limits on live entertainment, entirely. (Exhibits D-3 and D-4)

7. As a result of the petition, the Department investigated the appropriateness of the modifications sought. The Department concluded that all of the modifications sought should be denied. The Department determined:

- Modification of condition 1 to extend the sales, service, and consumption of alcoholic beverages from the current limit to 6 a.m. to 2:00 a.m. each day of the week is unwarranted because the circumstances that led to this condition still exist.
- The condition 2 modification is unwarranted because the circumstances that led to this condition still exist.
- Removal of condition 4, which imposes limits on live entertainment, is unwarranted because the circumstances that led to this condition still exist. (Exhibit D-3)

8. The Department also notified nearby residents, the San Diego City Council and the SDPD of the request for condition modifications sought by the Petitioner. The SDPD responded on December 14, 2020 with written opposition to all of the condition modifications sought by the Petitioner. SDPD Detective A. Wood (Wood) responded on behalf of the SDPD that the Licensed Premises location and the surrounding area continued to be over saturated with on sale licenses and that the census tract continued to be a significant high crime location. (Exhibit D-4)

9. During the investigation and during the hearing in this matter, Wood and SDPD Analyst J. Fankhauser provided information regarding calls for service in the crime reporting district containing the Licensed Premises. This district is identical to the census tract containing the Licensed Premises. A crime reporting district is considered "high crime" pursuant to section 23958.4(a)(2) if there is a 20% greater number of reported crimes than the average of all the crime reporting districts in the jurisdiction of the local law enforcement agency. It was determined by SDPD that this crime reporting district, in the year prior to the petition in this matter, had an average number of reported crimes that was 1146.3% above the average of the reporting districts in SDPD's jurisdiction. The SDPD witnesses also presented evidence that the Licensed Premises itself was a significant address identified in calls for service to SDPD. In 2018, there were 55 calls, in 2019, there were 48 calls and in 2020, there were 20 calls for service during a year that saw significant curtailed operations at the Licensed Premises because of the pandemic. In each of these years, there were at least 10 calls associated with the Licensed Premises address that involved disturbing the peace allegations. Some of these calls for service involved reports of violence. (Exhibit D-4)

10. Matthew Woods (Woods), a resident of one of the apartments above the Licensed Premises, also submitted a written opposition to the hours of operation modification sought by the Petitioner. In a December 21, 2020 email to the Department's assigned licensing representative, Woods specifically remarked about the Licensed Premises "they get pretty loud" when he opposed allowing them to serve alcohol to 2 a.m. (Exhibit D-9)

11. In its investigation and during the hearing in this matter, the Department presented extensive evidence that there have been no substantive changes in the composition of the area surrounding the Licensed Premises and that the crime reporting district and the Licensed Premises itself have had a significant impact on SDPD law enforcement resources. (Exhibit D-4) The Department presented certified records of prior discipline against the Licensed Premises in 2015, 2017 and 2018. The violations repeatedly involved its failure to comply with PCL conditions and failure to operate as a bona fide eating place. The most recent violation in 2018 also involved permitting a

minor to consume on the premises in violation of section 25658, allowing an employee to remain on the premises while intoxicated, and the refusal to allow an examination of books and records. (Exhibits D-2 and D-4)

12. The Petitioner presented evidence that some of the other licensed establishments doing business in the areas surrounding the Licensed Premises did not have the same restrictions on hours of service or operations as those imposed on the Licensed Premises. The Petitioner presented evidence that some of these businesses had received requested condition modifications during the general period when the Petitioner was seeking its modifications. The Petitioner, through the testimony of James Goro (Goro), and the exhibits that were introduced by the Petitioner (Exhibits A-1 through A-62), argued that the Petitioner was being treated in a disparate manner from other licensed premises in the area, even though their circumstances appeared to be comparable to those of the Licensed Premises. In its presentation of evidence, the Petitioner did not address whether the licensed establishments used for comparisons, in its evidence, had the record of disciplinary violations sustained against the Petitioner.

13. The Department investigated this concern of the Petitioner in its report. The Department presented evidence that a significant number of the type 47 licensed establishments surrounding the Licensed Premises were, in fact, subject to the same or more restrictive hours of operation and were all subject to the same ratio of alcohol versus food sales. While some of these establishments had PCLs that allowed live entertainment, a significant number of them, like the Licensed Premises, were not allowed to have live entertainment. (Exhibit D-4)

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. In cases involving an application for an original license or the premises-to-premises transfer of a retail license, rule 61.4³ provides that no such license shall be issued if the premises or its parking lot is located within 100 feet of a residence. An exception to this prohibition exists if the applicant establishes that the operation of the business would not interfere with such residents' quiet enjoyment of their property.

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

4. Section 23803(a) provides in relevant part that:

“ (a) The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, if it is satisfied that the grounds that caused the imposition of the conditions no longer exist, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. The department may not remove or modify any condition to which an objection has been filed without holding a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(b) 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.

5. In precedent decision *PAON Carlsbad LLC Db a 83 Degrees* (2018) 18-01-E, the Department director considered the issue of whether differing conditions in facially comparable licenses, alone, were a sufficient basis to justify a modification of conditions. In rejecting this conclusion, the Department director noted:

“The fact that the Department has recently issued licenses without the hours-restriction condition sought to be modified here, including two licenses issued during the pendency of this matter, is another such circumstance. That said, the fact that other nearby licenses were issued with different hours restrictions than the license here is, without more, not a justification to remove or modify the condition given that each application is evaluated independently.”

This precedent decision established that this circumstance is but one of many factors to considered in determining whether the Petitioner has met its burden of proof. The precedent decision went on to note 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.”

6. In this matter, the Petitioner has argued that the Licensed Premises has been singled out for disparate treatment and that the opposition to the condition modifications is without merit based

on differing conditions in facially comparable licenses. The evidence received in this matter established that there are multiple comparable businesses that have similar, or even more restrictive, conditions as the Petitioner. The evidence also supported the Department's position that these conditions were specifically tailored to limit the impact on law enforcement, and limit public welfare and morals violations caused by the high concentration of licenses in the area. The Petitioner, in presenting evidence of "comparable" license holders that were granted condition modification relief, also failed to address whether these other licensed establishments had the same extensive record of serious license violations that have been sustained against the Petitioner. Since its licensure in 2014, the Petitioner has had three sustained disciplinary incidents against its license. All three involved non-compliance with the existing conditions on the license at issue. The Petitioner has failed to establish that disparate treatment has occurred in this matter. (Findings of Fact ¶¶ 1-13)

7. At the time the type 47 license was presented to the Petitioner for issuance as a conditional license, the Department determined that there were residences within 100 feet of the Licensed Premises and its parking lot, that there was a significant, undue concentration of licenses in the area, and that the Licensed Premises was located in a high crime area. The Department further noted that the Petitioner was responsible for operating the Licensed Premises as a type 47, on sale general eating place. As a result of these "whereas" findings, 8 conditions were imposed on the license sought. The Petitioner agreed with these determinations and the conditions designed to mitigate their impact on the surrounding residences when it signed the original PCL in 2014 and the subsequent modified PCL that was issued in 2020. (Findings of Fact ¶¶ 1-13)

8. The conditions in question were imposed under rule 61.4 and they appeared to be directly designed to protect the quiet enjoyment of the residents in the residential properties in the immediate area surrounding the Licensed Premises. Importantly, they also appear designed to prevent undue pressure on law enforcement resources in the crime reporting district by curtailing circumstances that would be contrary to public welfare and morals. The conditions, including the ones at issue in this petition, are tailored to prevent undue noise, excessive alcohol consumption by patrons, and undue pressure on law enforcement resources created by drunk and unruly patrons leaving the Licensed Premises, *en masse*, after live performances, which are currently prohibited. Extensive evidence was received from the SDPD that the circumstances that led them to initially oppose the issuance of the type 47 license are still in existence. The SDPD lifted its opposition to the Petitioner's license only after eight conditions were agreed to by the Petitioner. (Findings of Fact ¶¶ 1-13)

9. The burden is on the Petitioner is to establish changed circumstances such that the imposed conditions would no longer be necessary. By all appearances, the circumstances that led to the conditions that were imposed are identical today with the exception of the departure of the church that was identified as a consideration point. The Licensed Premises is still within 100 feet of multiple residences and its operation has the potential to cause noise problems that could impact the quiet enjoyment of its neighbors if not regulated. The Licensed Premises operates in a crime reporting district that is extraordinarily high crime. Evidence was presented by the Department and the SDPD that the current operation of the Licensed Premises is already

negatively impacting law enforcement resources. Expanding the hours that privileges can be exercised and allowing various types of live entertainment would likely add to the negative impact on local law enforcement. The Petitioner has not shown changed circumstances that would justify revisiting the reasonable conditions imposed by the Department. (Findings of Fact ¶¶ 1-13)

10. Further, the proposal by Petitioner to remove condition 2 is unwarranted because it is contrary to applicable laws. The Licensed Premises remains a type 47 business, so it continues to have the obligations of that category of license in the exercise of its privileges. The Petitioner's sought relief would inappropriately blur the distinctions between type 47 and type 48 licenses such that they are barely distinguishable from each other. (Findings of Fact ¶¶ 1-13)

11. It is the Petitioner's burden to establish that the underlying grounds have changed. The Petitioner has failed to do so in this case. (Findings of Fact ¶¶ 1-13)

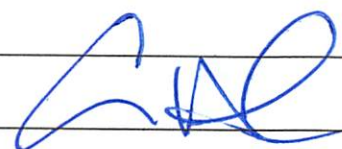
12. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

ORDER

The Petitioner's request to remove or modify conditions is hereby denied.

Dated: 9/13/2021


Alberto Roldan
Administrative Law Judge

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

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

PHANTOM LOUNGE and
NIGHTCLUB, LLC,
dba Phantom Lounge
1014 5th Avenue, Suite 140
San Diego, CA 92101,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9944
)
) File: 47-533936
) Reg: 21091167
)

**DECLARATION OF SERVICE
BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 400 R Street, Suite 320, Sacramento, CA; that on the 16th day of May, 2022, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below, by placing same in an envelope, sealing said envelope, having it certified (except as noted), and depositing same in the United States mail in the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid:

James Goro
1014 5th Avenue, Suite 140
San Diego, CA 92101
phantomlounge3@gmail.com

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

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 16th day of May 2022.

Maria Sevilla

MARIA SEVILLA