

OFFICE OF THE DIRECTOR OF EXCISE AND LICENSES
CITY AND COUNTY OF DENVER, STATE OF COLORADO

RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

IN THE MATTER OF THE APPLICATION OF NASHVILLE TAVERN CORPORATION, DOING BUSINESS AS **THE MONKEY BARREL**, FOR A TRANSFER OF LOCATION OF THE EXISTING TO GRANT A MODIFICATION OF THE PREMISES FOR THE EXISTING TAVERN LIQUOR LICENSE AND STANDARD CABARET LICENSE FROM 1611 PLATTE STREET TO THE PREMISES KNOWN AND DESIGNATED AS 4401 TEJON STREET, DENVER, COLORADO

Pursuant to prior written notice, this hearing was held at the Denver Department of Excise and Licenses, 201 West Colfax Avenue, Department 206, Denver, Colorado. An Order For An Evening Hearing was issued, and this public hearing was set for June 29, 2016 at 6:00 PM, pursuant to the license application filed by Nashville Tavern Corporation, a Colorado corporation. The hearing was set to determine the needs and desires of the designated area for a transfer of location of a previously issued tavern liquor license and standard cabaret license for the premises known and designated as 4401 Tejon Street, Denver, Colorado.

APPEARANCES

The Applicant appeared through the person of Jimmy Nigg, majority stockholder of the corporate Applicant, and was represented at the hearing by Brian Proffitt, attorney at law. The licensing authority was represented by Daniel Douglas, Assistant City Attorney. There were a number people present to oppose the license application, and they were organized and managed at the hearing by Keith Howard, an adult resident and property owner in the designated area.

AGENCY FILE

At the start of the hearing, all parties were advised that the documents in the agency file regarding this application are not automatically reviewed or considered in reaching a recommended decision in this matter, and if any party wanted a particular document to be reviewed and considered in reaching a recommended decision, then a specific request to do so would need to be made during the hearing. No one made a request to have the Hearing Officer review or consider any additional documents, whether from the agency file or elsewhere.

After reviewing the exhibits admitted into evidence at the hearing, the testimony of each of the various witnesses, some of which is summarized below, considering the closing statements of each party, and applying the existing law, the following recommended findings of fact, conclusions of law, and decision are made:

1. Pursuant to Denver Revised Municipal Code, the following neighborhood organizations, registered with the Planning Office, were sent notice of the public hearing, in addition to David Quinones, Deputy Chief of Operations, and Councilperson Rafael Espinoza:
 - a. Chaffee Park Neighborhood Association
 - b. Denver Neighborhood Association, Inc.
 - c. Denver Urban Resident Association
 - d. Highland United Neighbors, Inc.
 - e. Inter-Neighborhood Cooperation
 - f. Sunnyside United Neighbors, Inc.
 - g. United North Side Neighborhood

LICENSING AUTHORITY STIPULATED EXHIBITS

2. City's Exhibit C-1, the Publisher's Affidavit with a copy of the hearing notice published in The Daily Journal on May 31, 2016, was admitted into evidence by stipulation.

3. City's Exhibit C-2 is a map, shaded in orange, showing the area designated to be most affected by the issuance of the requested licenses. The exhibit was admitted into evidence by stipulation.

4. City's Exhibit C-3, a Liquor License Report, listing of all the liquor licensed outlets and cabaret licensed outlets in the designated area licensed by the Denver Department of Excises and Licenses, was admitted into evidence by stipulation.

The Report shows a total of four undifferentiated cabaret licensed outlets and 15 alcohol and liquor licensed premises in the designated area, as follows:

- | | | |
|----|---|--|
| a. | 3 | hotel and restaurant licenses |
| b. | 4 | tavern licenses |
| c. | 4 | retail liquor store licenses |
| d. | 2 | 3.2% fermented malt beverage [3.2% beer] off-premises licenses |
| e. | 1 | beer and wine license |
| f. | 1 | club license |

The exhibit also indicated that there is one liquor tasting licensed establishment in the designated area. However, this liquor tasting license is issued to an outlet that also holds another classification or type of liquor license, so this license did not serve to increase or add to the number of liquor licensed outlets in the designated area.

5. City's Exhibit C-4 was a photocopy of the Hearing Notice, with handwritten notations showing the dates that an Investigator for the Department of Excise and Licenses checked the proposed premises and found that the premises were properly posted. The premises were found to be properly posted beginning on May 31, 2016. This Exhibit was admitted into evidence by stipulation.

APPLICANT HEARING POSTING AFFIDAVIT

6. Applicant's Exhibit A-1, a Hearing Posting Affidavit, was accepted by stipulation. The Affidavit was signed and notarized on the date of the hearing, and indicated that the proposed licensed premises were posted with notice of this public hearing as required by the rules and regulations promulgated pursuant to the Denver Revised Municipal Code beginning on May 31, 2016.

APPLICANT PETITIONS

7. Applicant's Exhibit A-2, a total of four sets of pre-filed petitions circulated in the designated area, were admitted into evidence by stipulation. This Exhibit included two explanatory cover or summary sheets, one for the tavern license and one for standard cabaret license, and Affidavits signed by each of the petition circulators. As stated on the summary sheets, the petitions contained an aggregate total of 257 signatures in support issuance of the tavern liquor license, and 253 signatures in support issuance of the standard cabaret license.

During the hearing, Kelly Campbell, one of the people signing a petition in support of the tavern liquor license, testified that she no longer supported issuance of the tavern liquor license to the Applicant, and wished to have her signature stricken from the petition she signed. Her signature was on line 2 of the last page of the petition, having been signed on May 8, 2016. Based on her request at the hearing, her signature was deemed stricken, and was not considered as being in support of the tavern liquor license.

PETITION IN OPPOSITION TO APPLICATION

8. Protester's Exhibit P-1, one pre-filed petition circulated in the designated area, was admitted into evidence stipulation. The petition contained 32 signatures opposed to issuance of either the tavern liquor license or the standard cabaret license. The protest organizer agreed that one of the signatures on the petition was of a person who lived outside the designated area, and agreed that the correct number of signatures to be counted in opposition is 31 signatures.

APPLICANT REPRESENTATIVE TESTIMONY

9. Jimmy Nigg testified that he is the majority stockholder of the Applicant, and that he has 16 years experience as a manager of a liquor-licensed outlet, six years experience as an owner/operator of a hotel and restaurant liquor licensed outlet in Arvada, and two and a half years as owner of the Applicant. He testified that there have been no alleged liquor code violations while he operated the Monkey Barrel on Platte Street, and that a violation at the Arvada outlet was as part of a sting operation for service to an underage patron with a portrait ID.

He testified that the building at 1611 Platte Street where the Applicant previously operated was sold, so the Applicant needed to move out of that location in April. He testified that the proposed premises is a larger space than what the Applicant previously had.

He testified that he was drawn to the designated area, which he sees as a vibrant, up and coming area. He testified that it is a developing neighborhood, with a number of new projects, such as Cobbler's Corner. He testified that he anticipates that 44th Avenue will become a major hub in the area.

He testified that the outlet will have a kitchen, and that he is arranging with Tony Lonardo, formally with Carbone's Italian Deli, to manage the kitchen. He also testified that even after the kitchen closes down for the day, that sandwiches and other snacks will always be available as required by the tavern liquor license. He further testified that the Applicant intends to feature Colorado craft beers, and local wines and spirits. He testified that at the Platte Street location, the Applicant offered live music for several hours on Friday and Saturday nights, usually solo guitar players and duos, and that the music would rotate through the different decades from rock and roll to the present.

As part of overall noise abatement efforts, he testified that music would be kept to the interior of the building, that patio service would stop at 10:00 PM each evening, that there would be no dumping of trash after 10:00 PM each evening, and that the garage doors connecting, or separating, the larger outdoor uncovered patio area from the main dining area and music stage would be closed at 10:00 PM each night.

He testified regarding most of the other liquor and cabaret licensed outlets in the area, and primarily that most closed or stopped service before 10:00 each night, and that none of the cabaret outlets in the area offered any live music. He distinguished the proposed outlet from each of the other licensed outlets in the area he mentioned. He anticipated that the music would attract Gen-Xers to the outlet, and the Carbone's connection would attract families and a mix from the entire neighborhood.

He testified that he has previously completed an industry-sponsored training program, and the Applicant plans to have all employees, including future new hires, take and complete an industry-approved training program, participate in on-going review at various times during the year, and be re-certified each year. He further testified that employees will be informed that serving an alcohol beverage to an underage person is a criminal offense and may subject that server to criminal prosecution. He testified that the Applicant will have a policy to check the ID of every person seeking to purchase an alcohol beverage, and the Applicant will not accept any vertical or portrait photo identification.

The witness also provided additional information concerning plans to operate the licensed portion of the premises, including proposed or anticipated seating, on-site storage of alcohol product, information regarding the availability of a selection of craft beers and wines, parking, the patio area, availability of food items for snacks, area designated for live musical entertainment, type and scheduling of musical entertainment, the anticipated number of managers and employees, and the days and anticipated hours of operation.

He testified that he anticipates that he will be present on the premises five to seven days per day, and that the Applicant plans to have other qualified managers on site whenever he is not present.

The witness further testified that the premises will have two separate exterior uncovered seasonal patio areas, each facing Tejon Street. While it is still uncertain how much seating there will be in each patio area, they were currently configured to seat approximately 50 people and 18 people respectively. The patio area will be surrounded by railing other appropriate barrier approximately four feet in height.

The witness also testified that the larger outdoor patio area will be separated from or connected to the main dining area by large garage doors, and whenever there are customers in the outdoor patio area, there will be at least one staff member present in the patio area to adequately monitor and prevent patrons from removing any alcohol beverage from the premises.

In connection with his testimony, the witness specifically testified regarding City's Exhibit C-5, consisting of one page, the floor plan of the proposed licensed premises. The floor plan outlined in red the area to be covered by the cabaret and liquor license, and the areas on the premises where alcohol beverages may be sold, stored, served, and consumed. The witness also testified regarding the proposed location where the musicians would perform.

He specifically identified where the primary storage area for alcohol products will be, which is identified on the floor plan as a cooler in a separate room to which the general public will not have any access.

He also testified as to the location of the various different entrances to the premises, the location of the nearest street and area residences in relation to the proposed premises, the location of the kitchen and the primary bar area for patron seating and service, and that the exhibit was an accurate representation of the floor plan of the proposed premises.

The floor plan was modified during the hearing to remove the two outdoor patio areas from the proposed standard cabaret licensed area. Specifically, the floor plan was amended to outline in blue the area to be covered by the standard cabaret license. The modification was made by interlineation on City's Exhibit C-5 during the hearing. At the conclusion of this testimony, the amended floor plan, City's Exhibit C-5, was admitted into evidence.

The witness also testified regarding the document marked as Exhibit A-3, which is a letter from the landlord of the proposed premises. The witness testified that the landlord is out of the country at the time of the hearing, that he received the letter as an attachment to an e-mail, that he recognized the sender's e-mail address as being the landlord's e-mail address, and that he recognized the signature on the letter as being that of the landlord. There being no objection, Exhibit A-3 was admitted as evidence for the hearing.

The witness also testified that the feedback and comment from neighborhood residents that he has received has been very positive regarding plans for the proposed liquor licensed and cabaret licensed outlet. He testified that people seem excited regarding the proposed concept for the outlet.

WITNESS TESTIMONY - IN SUPPORT OF APPLICATION

10. Madeleine Zinn testified that she is the sole managing member of Sub Rosa Mercantile, LLC, which is a business located in the designated neighborhood. She testified that she is over twenty-one years of age, periodically drinks an alcohol beverage, signed a petition supporting this license application, and has owned and managed this business in the designated area approximately two years.

She believes there is a neighborhood need for an additional outlet with a tavern liquor license and a standard cabaret license, personally desires that the liquor establishment be able to provide live musical entertainment on occasion, and personally desires that both the tavern liquor license and standard cabaret license be issued to the Applicant.

She testified she is familiar with the designated area, which she described as an up and coming area with many new families moving into the area, and with recently completed retail and residential development at Cobbler's Corner, and more commercial development around 40th Avenue and Tejon Street. She stated that she is familiar with the location of the proposed premises in the designated area, and that the proposed premises, which have been vacant for approximately 7-8 months, are approximately three blocks from her business. She testified that used to live in the designated area, and she would often have to leave the area to find a good outlet to be able to consume an alcohol beverage.

She testified that the Applicant is very different from other outlets in the area. She testified that the other outlets do not offer a late night opportunity to consume an alcohol beverage. She would need to leave the designated area to be able to do that. She testified that the other outlets do not offer the opportunity to listen to live music. She would need to leave the designated area to be able to do that.

She testified that she has no financial or ownership interest in the Applicant's business, that she has no personal or other family benefit to be gained if the requested license is issued, and she believed the location of the premises is appropriate for the type of licenses being sought, that there really isn't a similar-type outlet in the designated area, that she has heard only positive things from neighbors in the area, and she is not aware of any reason the requested licenses should be denied.

She lastly testified that if the requested tavern liquor license and standard cabaret license is issued to the Applicant, she is confident that the liquor and cabaret licensed outlet will be lawfully operated; and she believes that the issuance of the requested tavern liquor license and standard cabaret license will not have an adverse impact on the public health, welfare, morals, or safety of the designated neighborhood.

11. Emily Chaney testified that she owns and manages residential property in the designated neighborhood. She testified that she is over twenty-one years of age, periodically drinks an alcohol beverage, has not previously signed a petition supporting these license applications, and has owned and managed property in the designated area approximately two years.

She believes there is a neighborhood need for an additional outlet with a tavern liquor license and a standard cabaret license, personally desires that the liquor establishment be able to provide live musical entertainment on occasion, and personally desires that both the tavern liquor license and standard cabaret license be issued to the Applicant.

She also testified that she is familiar with the designated area, since she lives less than a mile outside the designated area, and has lived in the general area of the designated area approximately fifteen years. She also testified that the designated area is very diverse, that it includes historic homes and new homes, and that it is mostly single family homes near the proposed premises. She testified that the area is urban-ish; close to downtown, but with a neighborhood feel.

She testified that the population in the area is growing, and becoming more densely populated with the redevelopment that is taking place in the area. She testified to her opinion that the area south of 44th Avenue is disconnected to the area west of Tejon Street, and that the proposed premises, being on the corner of 44th Avenue and Tejon Street will bring these two areas closer together. She testified that the outlet will draw increased foot traffic into the area, and the increased foot traffic will create greater safety for the area.

She testified that there is no other outlet in the designated area with a similar concept for local Colorado beers and wine as that proposed by the Applicant, that there is no other outlet offering similar music entertainment in the designated area, that there are not many food establishments in the immediate area, and none that serve food after 10:00 PM. She further testified that there is a lack of opportunity to listen to live music in the designated area. She testified that she has patronized the outlet at its previous location, and will patronize the outlet at the proposed premises as well.

She testified that music brings people together, but that people have to go downtown to listen to live music. She noted that the Sunnyside Music Festival takes place in the designated area each year, and there is a large neighborhood turnout for that.

She testified that she has no financial or ownership interest in the Applicant's business, that she has no personal or other family benefit to be gained if the requested license is issued, and she believed the location of the premises is appropriate for the type of licenses being sought, that the addition of this outlet will not disrupt the character of the designated area, that she does not have concerns for unlawful behavior either inside or outside the premises if the Applicant is granted the requested liquor and standard cabaret license, that she has heard only positive things from neighbors in the area, and she is not aware of any reason the requested licenses should be denied.

She lastly testified that if the requested tavern liquor license and standard cabaret license is issued to the Applicant, she is confident that the liquor and cabaret licensed outlet will be lawfully operated; and she believes that the issuance of the requested tavern liquor license and standard cabaret license will not have an adverse impact on the public health, welfare, morals, or safety of the designated neighborhood.

12. Matt Levesque testified that he is an adult resident in the designated neighborhood. He testified that he is over twenty-one years of age, periodically drinks an alcohol beverage, has not previously signed a petition supporting these license applications, and has resided and owned his home in the designated area approximately six years.

He believes there is a neighborhood need for an additional outlet with a tavern liquor license and a standard cabaret license, personally desires that the liquor establishment provide live musical entertainment, and personally desires that both the tavern liquor license and standard cabaret license be issued to the Applicant.

He testified that he is familiar with the designated area, which he described as having a mix of businesses and residences, and that his house is located across Chaffee Park from the proposed premises. He testified that 44th Avenue is a busy street, has a bus route, and that he agrees with the description of the designated area provided by the earlier witnesses.

He testified that there is no particular redevelopment near his home, but that there are many young families moving into the area. He testified that there are very few restaurants in the designated area, and that he usually needs to drive and leave the area to get a meal for lunch or dinner, that he usually needs to leave the area to consume an alcohol beverage, and that he needs to leave the area to be able to listen to live music.

He testified that the Sunnyside Music Festival takes place in Chaffee Park, right across from his home, the weekend after Labor Day, and he believes the fact that thousands of people attend the Festival is evidence of the need and desire in the area for live music.

He testified that the proposed premises have been vacant for most of the time he has lived in the area, and he believed that having an on-going business across from Chaffee Park promotes safety for the entire area.

He testified that he has no financial interest in the Applicant's business, that he has no personal or other family benefit to be gained if the requested license is granted, that he believed that the location of the premises is appropriate for the type of licenses being sought, that he has heard only positive things from neighbors in the area, and that he is not aware of any reason the requested licenses should be denied. He also testified that he would likely patronize this outlet if the requested license is issued.

He lastly testified that if the requested tavern liquor license and standard cabaret license is issued to the Applicant, he is confident that the liquor and cabaret licensed outlet will be lawfully operated; and he believes that the issuance of the requested tavern liquor license and standard cabaret license will not have an adverse impact on the public health, welfare, morals, or safety of the designated neighborhood.

WITNESS TESTIMONY - IN OPPOSITION TO APPLICATION

13. Meghan MacNeil testified that she is an adult resident in the designated neighborhood. She testified that she is over twenty-one years of age, periodically drinks an alcohol beverage, has not previously signed a petition regarding either of these license applications, and has resided and owned her home in the designated area approximately four years. She does not believe there is a neighborhood need for an additional outlet with a standard cabaret license, and personally desires that the standard cabaret license not be issued to the Applicant.

She also testified regarding her familiarity with the designated area, which she described as rather low density. She stated that while the area density may be increasing somewhat, it is not increasing all that much. She specifically testified that she lives approximately 300 feet from the proposed premises. She testified that she believes the location for the proposed outlet is not an appropriate location for the type of outlet described by the Applicant.

She testified that she is not opposed to the Applicant having the liquor license and being a neighborhood bar, and is reasonably confident that the outlet would be lawfully operated. However, she is concerned regarding the noise that will be generated by music escaping the premises and the plans of the Applicant to operate significantly later hours than most any other business in the area. She testified that she is also concerned regarding patron behavior outside the premises and the negative impact on the neighborhood that will occur by having people leave the premises during those later hours, and believes that the outlet as described by the Applicant will be disruptive to the current character or enjoyment of the area, and have a negative impact on the public health, welfare, morals, and safety of the designated neighborhood.

14. Katie Campbell testified that she is an adult resident in the designated neighborhood. She testified that she is over twenty-one years of age, periodically drinks an alcohol beverage, and has resided in the designated area approximately six months. She does not believe there is a neighborhood need for an additional outlet with a tavern liquor license or a standard cabaret license, and personally desires that the tavern liquor license and the standard cabaret license not be issued to the Applicant.

The witness' request to retract her earlier support for the license application, as demonstrated by her signature on one of the Applicant's petitions, was addressed previously in this Recommended Decision.

She also testified regarding her familiarity with the designated area, and specifically to the fact that the area closest to the proposed premises is primarily or predominantly residential, that it is primarily or predominantly residential on Tejon Street between 44th and 45th Avenue, that it is primarily or predominantly residential on Umatilla Street between 44th and 45th Avenue, and that it is primarily or predominantly residential in the area just north of the proposed premises.

She specifically testified that she lives approximately 150 feet from the proposed premises. She testified that she believes the location for the proposed outlet is not an appropriate location for a business that will be open to the public with late night hours. She testified that other businesses in the area close around 10:00 PM or 11:00 PM at night, and that is evidence to her of what the neighborhood need is.

She testified that there already is a certain amount of unmanaged outside noise near this intersection from the bus stop and from Chaffee Park, and that any additional noise due to music from the proposed premises would be a major disturbance for the area. She testified that she believes that the issuance of the requested tavern liquor license and standard cabaret license will have an adverse impact on the public health, welfare, morals, or safety of the designated neighborhood.

15. Keith Howard testified that he is an adult resident in the designated neighborhood. He testified that he is over twenty-one years of age, periodically drinks an alcohol beverage, has not previously signed a petition regarding these license applications, and has resided and owned his home in the designated area since 1993. He does not believe there is a neighborhood need for an additional outlet with a tavern liquor license or a standard cabaret license, and personally desires that the tavern liquor license and the standard cabaret license not be issued to the Applicant.

He also testified regarding his familiarity with the designated area, which he described as a quiet, low density neighborhood. He testified that he lives about one block from the proposed premises, and that he believes the location for the proposed outlet is not an appropriate location for a entertainment venue as described by the Applicant. He testified that there is limited noise pollution at the present time, and that residents in the area have the current ability to sit peaceably in their yard in the evenings. He testified that he believes that such an entertainment outlet would create a significant or clearly noticeable increase in noise and late night disturbance in the area when people are leaving the outlet.

Several proposed exhibits were discussed in connection with his testimony. This is not a zoning hearing, and those proposed exhibits more focused on zoning matters were not accepted. A previously filed floor plan was admitted as Exhibit P-3.

EN MASSE TESTIMONY

16. It appeared that both the Applicant and those in opposition had numerous people present to testify as en masse witnesses. Given the order of presenting witnesses and evidence at the hearing, by the time en masse witnesses were called to identify themselves, it then appeared that many of the people who were present at the beginning of the hearing had already left. At the time that en masse witnesses were called, there was one en masse witness in support of the license applications, and one en masse witness opposed to the license applications.

The en masse witness who testified in support of the license applications testified that he is an adult resident or owner or manager of a business in the designated neighborhood, that he did not previously sign a petition regarding the requested license applications, that he periodically drinks an alcohol beverage, and that he is over twenty-one years of age.

The witness further testified that he believes there is a neighborhood need for an additional outlet with a tavern liquor license and a standard cabaret license, personally desires that the liquor establishment provide live musical entertainment, and personally desires that both the tavern liquor license and standard cabaret license be issued to the Applicant.

The witness lastly testified that he was confident that if the requested licenses were issued, that the licensed outlet would be lawfully operated; and that he believed that the issuance of the requested tavern liquor license and standard license would not have an adverse impact on the public health, welfare, morals, or safety of the designated neighborhood.

The en masse witness who testified in opposition to the license applications testified she is an adult resident in the designated neighborhood, that she did not previously sign a petition regarding the requested license applications, that she periodically drinks an alcohol beverage, and that she is over twenty-one years of age.

The witness further testified that she does not believe there is a neighborhood need for an additional outlet with either a tavern liquor license or a standard cabaret license, does not personally desire that the outlet provide live musical entertainment, and personally desires that both the tavern liquor license and standard cabaret license not be issued to the Applicant.

The witness lastly testified that she was not confident that if the requested licenses were issued, that the licensed outlet would be lawfully operated; and that she believed that the issuance of the requested tavern liquor license and standard license would have an adverse impact on the public health, welfare, morals, and safety of the designated neighborhood.

TESTIMONY BY REGISTERED NEIGHBORHOOD ORGANIZATION

17. Testifying on behalf of a neighborhood group pursuant to §12-47-311(5)(d), C.R.S., regarding the proposed licenses was Jennifer Superka, who represented Sunnyside United Neighbors, Inc., a registered neighborhood organization. She testified that she is the President of the neighborhood group, a position she has held for the past two years, was authorized by the neighborhood group to present its position at the public hearing.

She testified that the boundary of the organization is roughly Interstate 70 to the north, 38th Avenue to the south, Inca Street to the east, and Federal Boulevard to the west. She testified that she is a member of the neighborhood organization, and that she resides within the organization's boundary. She further testified that there are approximately 4000 households in the neighborhood organization, and the basis for determining membership is being a resident or business owner within the organization's boundary.

Normally, it is the Board of Directors that determines the position of the organization regarding requested liquor and cabaret applications. As part of its review and determination, the Board generally tries to enter into a formal Good Neighbor Agreement with an Applicant. The organization and the Applicant were not able to agree on the terms of a Good Neighbor Agreement. The witness testified that the organization's position regarding issuance of the requested licenses in this case was not contingent on the Applicant entering into the written Good Neighbor Agreement.

The meeting at which the neighborhood organization formally decided its position took place on June 20, 2016. The meeting was a regular monthly meeting of the Board of Directors. Of the 15 members of the Board of Directors, ten members were present and took part, which was enough for a quorum, and the vote was 6-4, not to oppose the proposed liquor and cabaret license application.

TESTIMONY BY CITY COUNCILPERSON

18. City Councilperson Rafael Espinoza also testified pursuant to the Policies and Procedures of the Denver Department of Excise and Licenses relating to public hearings. The proposed premises are located in his council district.

The Hearing Officer recognizes that the position of a city councilperson is somewhat different than that of the other witnesses at the hearing. Testimony of a city councilperson may be part fact witness and part commentary, analysis, or opinion regarding the makeup of the district, opinion regarding the needs and desires of the designated area, and opinion regarding the plans of the Applicant among other things. That a councilperson is allowed to comment and give such opinions does not make him an expert witness, and he is not treated as such. The Hearing Officer must therefore distinguish between testimony that may be properly considered as fact-based and that which is not.

Councilperson Espinoza testified to his opinion that the proposed Good Neighbor Agreement, which was not admitted as an exhibit for the hearing, contained language and conditions that more accurately and fully reflect the needs and desires of the designated area. He also testified that he understood the opinion of some that the Applicant misrepresented its plans and intentions for the outlet. He specifically testified that he could see how the fact that the Applicant changed some aspects of its plans for the outlet would create an issue that the Applicant misled the registered neighborhood organization and the community, but that he was not going to find that the Applicant intentionally or knowingly misled anyone. He testified that he recognized that clearly a segment of the designated area is upset, and that segment expressed its desire against the application.

The Hearing Officer greatly appreciates the statements and comments of City Councilperson Espinoza. The Hearing Officer also accepts that the Applicant will most assuredly disagree with most, if not all of his statements and comments. As the statements were more commentary than factual evidence, the comments of City Councilperson Espinoza did not serve to influence or change what the Recommended Decision was already going to be based on the testimony and evidence otherwise admitted at the hearing.

DUPLICATION OF TESTIMONY

19. It was previously noted in this Recommended Decision that a witness may have also signed a petition in support of the requested liquor and cabaret licenses sought by the Applicant. Whenever duplication of a witness' position has occurred, whether or not that duplication was specifically noted in the Recommended Decision, the Hearing Officer gave consideration only to one form of a person's position. and that consideration was given to in person testimony over signing a petition. While the record may contain or make reference to some duplication of a witness' position, there was no duplication of or increase in the consideration or weight given that witness' position in reaching a Recommended Decision in this matter.

STANDARD ADVISEMENT REGARDING FLOOR PLAN

20. As stated at the conclusion of the hearing, the Applicant was notified that even if the license applications are approved, pursuant to the Colorado Liquor Code and the Denver Revised Municipal Code, no license shall be issued until the building in which the business is to be conducted is ready for occupancy with such furniture, fixtures, and equipment in place as is necessary to comply with the applicable provisions of the Colorado Liquor Code and the Denver Revised Municipal Code, and then only after inspection of the premises has been made by the licensing authority to determine that the Applicant has complied with the architect's drawing and the plot plan and the detailed sketch for the interior of the building as finally amended at the public hearing.

The Applicant was further advised that any Recommended or Final Decision relates only to the floor plan finally amended at the hearing, and any additional changes to the proposed premises without properly notifying the Department of Excise and Licenses will result in a delay in the issuance of the requested license, and may require filing an amended floor plan or filing an application to modify the premises.

STATEMENT OF LAW

21. Almost all the court decisions cited here have to do with the initial granting or denial of a liquor license. Since decisions specifically relating to the granting or denial of a cabaret license are rare, these cited decisions are deemed to be both illustrative and persuasive as to the issues involved in granting or denying a cabaret license, and are therefore treated as having some guidance in this matter.

A. NEEDS AND DESIRES

The primary focus of this hearing is to consider and determine the reasonable needs of the designated neighborhood and the desires of its inhabitants regarding the granting or denial of this tavern liquor and standard cabaret license application as evidenced by petitions, remonstrances (protests), or otherwise. See Hauf Brau v. Board of County Commissioners, 359 P.2d 659 (Colo. 1961). Neither factor is in itself controlling, but both must be considered together. Bailey v. Board of County Commissioners, 376 P.2d 519 (Colo. 1962); Duran v. Riggs, 363 P.2d 656 (Colo. 1961). Each case to a large degree turns on the record as made by the Applicant and other interested parties at the public hearing. Board of County Commissioners v. National Tea Company, 367 P.2d 909 (Colo. 1962).

Local licensing authorities are vested with wide discretion in determining the necessity for issuance of particular licenses, Board of County Commissioners v. Salardino, 329 P.2d 629 (Colo. 1958), and the exercise of discretion necessarily recognizes that action is based on evidence from which reasonable persons might honestly draw different conclusions, Board of County Commissioners v. Bova, 385 P.2d 590 (Colo. 1963). With that in mind, some factors and some rulings are specifically noted.

B. PRIMA FACIE CASE and BURDEN

The Applicant has the initial burden of showing prima facie that the desires and reasonable requirements of the neighborhood dictate the issuance of a license, Board of County Commissioners v. National Tea Company, 367 P.2d 909 (Colo. 1962), or that the designated area is not already adequately served by the existing licensed outlets. Board of County Commissioners v. Salardino, 329 P.2d 629 (Colo. 1958).

There are cases which hold that the power to license the sale of alcoholic beverages includes the power to refuse a license, even when the statutory or preliminary requirements are complied with, Geer v. Susman, 298 P.2d 948 (Colo. 1956); MacArthur v. Sierota, 221 P.2d 346 (Colo. 1950); Downes v. McClellan, 210 P. 397 (Colo. 1922), however, it has more recently been held that once a prima facie case has been made, the obligation is on the protestants to present evidence sufficient to justify denial. Southland Corporation v. City of Westminster City Council, 746 P.2d 1353 (Colo. App. 1987).

C. PETITIONS

Signatures on petitions in support of issuance of the requested license is but another way of stating that they “desire” the outlet and the existence of this “desire” is some evidence that the “reasonable requirements” of the neighborhood are not being met, Board of County Commissioners v. National Tea Company, 367 P.2d 909 (Colo. 1962), Rais v. City of Gunnison, 539 P.2d 1328 (Colo. App. 1975) **NSOP**, but the number of persons signing for or against a license is not wholly determinative of either the reasonable requirements or the desires of the neighborhood, Vigil v. Burress, 404 P.2d 147 (Colo. 1965). The expressions of opinion as to the requirements of the neighborhood and the needs of the inhabitants, as contained in the petitions and remonstrances, are entitled to consideration; they are not necessarily conclusive or controlling, MacArthur v. Sanzalone, 225 P.2d 1044 (Colo. 1950).

The Colorado courts have repeatedly held that the number of signatures on petitions is not dispositive, Jennings v. Hoskinson, 382 P.2d 807 (Colo. 1963) (uphold denial; ten other outlets in area, two within block or so of premises; petitions: 600 in favor, no opposition to license); Quedens v. J.S. Dillon Company, 360 P.2d 984 (Colo. 1961) (denial upheld; other outlets in area; petitions 3-1 in favor); McIntosh v. Council of City of Littleton, 360 P.2d 136 (Colo. 1961) (denial upheld; other outlets in area, including next door to premises; petitions 499-0 in favor); that the signatures on petitions are not evidence of need, MacArthur v. Presto, 221 P.2d 934 (Colo. 1950) (denial upheld; other outlets in area; Applicant losing customers; petitions are expression of opinion and are without factual support); Board of County Commissioners v. Bova, 385 P.2d 590 (Colo. 1963) (denial upheld; petitions are not evidence of need); and that the relative uniqueness of a facility does not mandate or require the granting of a license, Board of County Commissioners v. Evergreen Lanes, Inc., 391 P.2d 372 (Colo. 1964).

REVIEW AND COMMENT REGARDING EVIDENCE AND TESTIMONY

22. This is a difficult situation. The Applicant is seeking two different licenses. The needs and desires of the designated area can turn out to be different for each license. Neighborhood need and desire for a liquor license does not automatically become or demonstrate equal need or desire for a cabaret license. Opposition to a cabaret license does not automatically become or demonstrate equal opposition to a liquor license. Each license addresses a different and distinct need, and each license raises different concerns and impact on a designated area. The evidence presented at this hearing clearly demonstrated that was in fact the case regarding these two different requested licenses.

The Applicant presented live witnesses and petition signatures in support of the separate liquor license and cabaret license. The Applicant established a prima facie case for each requested license.

Each witness in opposition specifically testified that the designated area is low population density and primarily residential. Each witness in opposition testified that other liquor licensed outlets in the area are closed by 11:00 PM, and that was very important to them. Each witness in opposition testified regarding his or her concern for sound escaping from a cabaret licensed outlet late at night and into the early morning, and the effect that would have on his or her peaceful enjoyment of his or her home.

In response or anticipation of these concerns, the Applicant modified its floor plan to exclude the outdoor uncovered patio areas from the cabaret license. During his testimony, the Applicant representative stated that the Applicant would voluntarily take measures or have policies designed to substantially address the concerns expressed by those in opposition. But he also stated that the Applicant would not agree to a Good Neighbor Agreement that incorporated those or similar measures.

The Applicant testified that 44th Avenue will become a major hub in the area. Apparently, it is not that now. The Applicant also presented testimony regarding the popularity of the Sunnyside Music Festival. That Festival is one weekend a year, not every week. That Festival takes place in an open air park, and apparently does not create opposition or negatively impact peaceable living for those living near the park.

As previously noted, opposition was much more directed or expressive regarding the sound from a late night music venue. The Hearing Officer believes that concern regarding noise from a late night music venue is less speculative and potentially more disruptive to an area than concern regarding noise from a late night liquor outlet. The holder of a liquor license is better able to manage and control sound from a liquor licensed outlet than the amplified music from a standard cabaret outlet. Since sound levels from a standard cabaret outlet can be more disruptive to an area, the Department of Excise and Licenses has been more sensitive to that negative or adverse impact when there is organized opposition in the designated area that raises that concern.

Each witness in opposition testified regarding his or her concern for noise from a cabaret licensed outlet late at night and into the early morning, and the effect that would have on his or her peaceful enjoyment of his or her home. It is much easier for a license holder to regulate and reasonably insure that patrons do not take alcohol beverages with them when they leave the premises. Signage can be posted to remind patrons of the law, and alcohol beverages exist in a tangible physical form and can be confiscated if patrons do not follow the law. Sound, being neither tangible or physical like an alcohol beverage, cannot be confiscated at the door or easily prevented from leaving the premises. The difference between pleasant music and disturbing noise is in the ear of the beholder. Pleasant music at 10:00 PM may become disturbing noise at 11:00 PM.

The Applicant testified that it will have two separate exterior uncovered seasonal patio areas, each facing Tejon Street. The Applicant further testified that the larger patio area will be separated from or connected to the main dining area by large garage doors. Even if the garage doors are kept closed when there is live musical entertainment, garage doors may not be the best or a particularly effective sound abatement against amplified music late at night. Sound will escape.

The Hearing Officer finds that it is somewhat unusual that most or all of the liquor licensed outlets in a defined area will close by 11:00 PM at night. Under the circumstances and testimony provided in this matter, the Hearing Officer further finds that this situation is just as likely a demonstration or recognition of the needs and desires of the designated area as it is a demonstration of an area need that is not being met.

This all goes to the point that even if an Applicant can clearly identify some need as to the availability of alcohol outlet or standard cabaret outlet that is not being met in the designated area, the issue remains whether the Applicant has sufficiently met its burden as to the desires of the adult inhabitants of the designated area for an additional liquor licensed outlet and standard cabaret licensed outlet as proposed by the Applicant. Personal desire is not an objective or quantifiable determination; it is necessarily subjective. The Hearing Officer concludes that those in opposition have presented more than sufficient credible evidence to meet their burden to show that the adult inhabitants of the designated area desire that the standard cabaret license not be issued to the Applicant.

It is one thing to recognize that a standard cabaret outlet will likely release more sound into a neighborhood than a liquor licensed outlet without a standard cabaret license. At some point, that sound becomes too disruptive for a given area. It is not for a Hearing Officer to decide when that too disruptive point is reached. If, or when, that point is reached is determined by the collective sense of the adult inhabitants of the designated area as presented at a public hearing on that issue. Personal desire is not an objective or quantifiable determination; it is subjective.

Even though subjective, personal desire cannot be predicated on improper discrimination or unrealistic expectations or demands. The Hearing Officer finds that the expression of personal desire presented at the public hearing not to have a standard cabaret licensed outlet in the midst of a predominantly residential area, with numerous homes less than 1000 feet from the cabaret licensed premises, was sincere and not a pretext for discrimination.

The Applicant did not present much evidence regarding noise management and abatement. The Applicant representative testified that live music at its prior location was on Fridays and Saturdays nights for up to three hours. Even if the same schedule is instituted here, there was no evidence as to which three hours that might be. The Applicant representative also testified that it would close the garage doors connected to the larger outdoor uncovered patio at 10:00 PM, and while that may well be true, that could also change.

The Applicant is not obligated to enter into a contract with a neighborhood organization, and is not required to allow conditions to be placed on its license. However, without a such a contract or condition, there is no enforcement mechanism or guarantee that the hours of operation for patio service or music entertainment will not change to much later in the evening. That gives some added weight and consideration to the lack of desire expressed by those in opposition. The expressed lack of desire cannot be ignored or discounted.

ACCORDINGLY, having considered the evidence in its entirety, it is concluded by the weight thereof that the Applicant has sustained its burden to show that there is a need for the applied-for tavern liquor license to meet the reasonable requirements of the neighborhood and that the residents and owners and managers of businesses in the designated area desire the requested license, have confidence that the outlet will be lawfully operated, and believe that the issuance of the tavern liquor license will not have an adverse effect on the health, safety, or welfare of the designated area for the establishment known and doing business as Monkey Barrel, located at 4401 Tejon Street, Denver, Colorado.

However, having further considered the evidence in its entirety, it is also concluded by the weight thereof that the Applicant has not sustained its burden to show that the residents and owners and managers of businesses in the designated area desire the requested standard cabaret license or believe that the issuance of the standard cabaret license will not have an adverse effect on the health, safety, morals, or welfare of the designated area for the establishment known and doing business as Monkey Barrel, located at 4401 Tejon Street, Denver, Colorado.

IT IS THEREFORE RECOMMENDED THAT the tavern liquor license application be approved, but that the standard cabaret license be denied.

If the parties in interest, the Applicant and those in opposition, should request that the hearing be re-opened to allow them to engage in negotiation to reach a mutually agreeable settlement or agreement regarding the requested licenses, the Hearing Officer would also recommend that a request to re-open the hearing for that purpose be granted.

RECOMMENDED this 18th day of July, 2016.

/s/ Kip David Barrash

Kip David Barrash
Hearing Officer

INFORMATION REGARDING OBJECTIONS AND FINAL DECISION

Any party in interest may file objections to the foregoing Recommended Decision within ten (10) calendar days from the date above.

All filings shall be made by e-mail to the Deputy Director at: judy.steele@denvergov.org, with copies sent EXLRecordsManagement@denvergov.org; CAOExciseandLicense@denvergov.org; the Assistant City Attorney; and any additional party listed in the Certificate of Service.

The Director of the Department of Excise and Licenses will issue a **FINAL DECISION** in this matter following review and consideration of the Recommended Decision, and if applicable, any objections.

CERTIFICATE OF SERVICE

The undersigned hereby states and certifies that one true copy of the foregoing Recommended Findings, Conclusions, and Decision was sent via e-mail transmission on the date above, addressed to the following:

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/s/ Kip David Barrash
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Hearing Officer