Application:

APPEAL APPLICATION

This application is to be used for any appeals authorized by the Los Angeles Municipal Code (LAMC) for discretionary actions administered by the Department of City Planning.

1. APPELLANT BODY/CASE INFORMATION

Appellant Body:

☐ Area Planning Commission ☐ City Planning Commission ☒ City Council ☐ Director of Planning

Regarding Case Number: DIR 2008-3094 (RV) (PA3)

Project Address: El Arroyo Bar; 7026 South Broadway, Los Angeles, CA 90003

Final Date to Appeal: 09/03/2015

Type of Appeal:
☐ Appeal by Applicant
☑ Appeal by a person, other than the applicant, claiming to be aggrieved
☐ Appeal from a determination made by the Department of Building and Safety

2. APPELLANT INFORMATION

Appellant's name (print): Juan Barrales Amador (Marcello Barrales)

Company: El Arroyo Bar

Mailing Address: 7026 South Broadway

City: Los Angeles State: CA Zip: 90003

Telephone: (323) 434-9740 E-mail:

- Is the appeal being filed on your behalf or on behalf of another party, organization or company?

  ☑ Self ☐ Other: Appellant's Use/C.U.P. was revoked. He appeals.

- Is the appeal being filed to support the original applicant's position? ☐ Yes ☑ No

3. REPRESENTATIVE/AGENT INFORMATION

Representative/Agent name (if applicable): Joshua Kaplan

Company: Law Offices of Joshua Kaplan

Mailing Address: 11835 West Olympic Blvd., Suite 1125E

City: Los Angeles, State: CA Zip: 90064

Telephone: (310) 478-1920 E-mail: jk@joshuakaplanlaw.com

4. JUSTIFICATION/REASON FOR APPEAL

Is the entire decision, or only parts of it being appealed? ☑ Entire ☐ Part

Are specific conditions of approval being appealed? ☐ Yes ☑ No

If Yes, list the condition number(s) here: _____

Attach a separate sheet providing your reasons for the appeal. Your reason must state:

- The reason for the appeal
- How you are aggrieved by the decision
- Specifically the points at issue
- Why you believe the decision-maker erred or abused their discretion

5. APPLICANT'S AFFIDAVIT

I certify that the statements contained in this application are complete and true:

Appellant Signature: JUAN · BARRALES AMADOR (MARCELO BARRALES) Date: 8/26/15

6. FILING REQUIREMENTS/ADDITIONAL INFORMATION

- Eight (8) sets of the following documents are required for each appeal filed (1 original and 7 duplicates):
  - Appeal Application (form CP-7769)
  - Justification/Reason for Appeal
  - Copies of Original Determination Letter
- A Filing Fee must be paid at the time of filing the appeal per LAMC Section 19.01 B.
  - Original applicants must provide a copy of the original application receipt(s) (required to calculate their 85% appeal filing fee).
- Original Applicants must pay mailing fees to BTC and submit a copy of receipt.
- Appellants filing an appeal from a determination made by the Department of Building and Safety per LAMC 12.26 K are considered original applicants and must provide noticing per LAMC 12.26 K.7.
- A Certified Neighborhood Council (CNC) or a person identified as a member of a CNC or as representing the CNC may not file an appeal on behalf of the Neighborhood Council; persons affiliated with a CNC may only file as an individual on behalf of self.
- Appeals of Density Bonus cases can only be filed by adjacent owners or tenants (must have documentation).
- Appeals to the City Council from a determination on a Tentative Tract (TT or VTT) by the Area or City Planning Commission must be filed within 10 days of the date of the written determination of said Commission.
- A CEQA document can only be appealed if a non-elected decision-making body (ZA, APC, CPC, etc.) makes a determination for a project that is not further appealable. (CA Public Resources Code § 21151 (c)). CEQA Section 21151 (c) appeals must be filed within the next 5 meeting days of the City Council.

This Section for City Planning Staff Use Only		
Base Fee: 106.80	Reviewed & Accepted by (DSC Planner): Daniel Skolnick	Date: 8/28/15
Receipt No: 0202251291	Deemed Complete by (Project Planner):	Date:
☒ Determination authority notified	☐ Original receipt and BTC receipt (if original applicant)	

ATTACHMENT TO APPEAL APPLICATION – PARAGRAPH 4 –

JUSTIFICATION/REASON FOR APPEAL (CASE NO. DIR2008-3094 (RV) (PA3)

(1). THE REASON FOR THE APPEAL: Since in or about 1994, El Arroyo Bar has operated under the authority of a Conditional Use Permit approved by the Los Angeles City Zoning Administrator at 7026 South Broadway, Los Angeles, CA 90003. The approved operation has at all times involved the on-site sale of beer in a 3,380 square foot bar. As such, that use has long ago vested and remains vested notwithstanding a change in the original owner/operator of the business to this Appellant. On August 19, 2015, Appellant's aforesaid vested use was revoked by decision of Associate Zoning Administrator Lourdes Green. A copy of that decision is attached hereto and incorporated by reference as though set forth hereat in full. Appellant respectfully submits that the reason for this appeal is to preserve Appellant's aforesaid vested use; to prevent the operative effect of the aforesaid revocation of use decision dated August 19, 2015 and thereby to preserve Appellant's sole and singular source of livelihood.

(2). HOW APPELLANT IS AGGRIEVED BY THE DECISION: Appellant derives his sole and singular source of revenue from the afore-described business operations and the afore-described use has been long vested. The August 19, 2015, revocation of that use will deprive Appellant of his only source of revenue; will drive Appellant into bankruptcy and will cause him both financial and emotional ruin.

(3). SPECIFY THE POINTS AT ISSUE: Appellant contends that the August 19, 2015, revocation of use decision constitutes a prejudicial abuse of discretion; an act in excess of jurisdiction; that the decision is not supported by legally cognizable and adequate findings; that the findings, if any, contained therein are not supported by substantial evidence and that the decision is void as infected with and as having resulted from a prejudicial bias and prejudice against Appellant and the minority nature of Appellant and his clientele. Appellant further contends that the afore-described use does not contravene the criteria set forth in Los Angeles Municipal Code §12.27.1 (B) in that the use does not jeopardize or adversely affect the public health, peace or safety of persons residing or working on the premises or in the surrounding area. It does not constitute a public nuisance. It has not resulted in repeated nuisance activities as defined by the Code. It has not adversely impacted nearby uses. It has not violated any provision of any relevant regulation, ordinance or statute. Appellant has not knowingly or willfully violated any condition imposed by any prior discretionary land use approval which is applicable to this matter. All of the above constitute the points at issue in this appeal.

(4). THE DECISION MAKER ERRED OR ABUSED DISCRETION: At all times relevant, Appellant has made reasonable efforts to comply with all reasonable and constitutionally applicable conditions imposed upon his use herein. The revocation decision fails to acknowledge and address those efforts by Appellant. Additionally, that decision fails to acknowledge and understand myriad cultural imperatives and customs of the Hispanic community which constitutes the predominant patron demographic of the

premises. The revocation decision results from bias and prejudice against Appellant and the predominant Hispanic community demographic and its customs and practices with regard to community bars such as Appellant's. This is particularly applicable to the predominant custom and practice of patrons demonstrating their gracious hospitality toward others in the premises by purchasing beverages for those other patrons and/or by patrons in the premises greeting or conversing with other patrons by asking them to "buy me a beer". Although Appellant has taken every reasonable measure to preclude any violations of law including, but not limited to, "solicitation of the purchase of alcoholic beverages", the aforesaid custom and practice of patrons has on occasion occurred.

However, there is no legally cognizable evidence in this record that any individual asked another individual in Appellant's premises to purchase them an alcoholic beverage when either person was an employee of Appellant nor is there any evidence that Appellant at any time paid a percentage or commission to anyone to solicit the purchase of alcoholic beverages. Additionally, there is no substantial evidence below that Appellant employed or permitted any other person to loiter in the premises for the purpose of soliciting alcoholic beverages.

Therefore, there is no substantial evidence in this record that there was any violation of California Business & Professions Code §25657 which provides as follows:

"It is unlawful:

> (a) For any person to employ, upon any licensed on-sale premises, any person for the purpose of procuring or encouraging the purchase or sale of alcoholic beverages, or to pay any such person a percentage or commission on the sale of alcoholic beverages for procuring or encouraging the purchase or sale of alcoholic beverages on such premises.
>
> (b) In any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting."

It is respectfully submitted then that each and all of the findings in the decision below with regard to this issue are legally erroneous.

While there allegedly were some forms of "misconduct" in or about Appellant's premises and/or in the vicinity thereof; since Appellant made every reasonable effort to preclude such, Appellant is not liable for same. Additionally, there has been a failure of proof in the proceedings below such that there is no substantial evidence that the individuals who allegedly caused or engaged in such misconduct were at any time owners, employees, authorized agents, patrons or other persons authorized by or affiliated with Appellant. As such, Appellant cannot be held liable for their "misconduct", if any.

No substantial evidence was produced below to support any finding that Appellant's business premises constituted a "public nuisance" because of any adverse impact on the surrounding community nor because of any "excessive" police calls.

California Code of Civil Procedure §3480 defines a "public nuisance" as " . . . One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal". Nowhere within the four corners of these proceedings is there a scintilla of evidence that anything proximately caused by Appellant's operation affected an entire community or neighborhood or a considerable number of persons. As such, there was a failure of proof with regard to the required finding set forth in Los Angeles Municipal Code §12.27.1 (B)(2) as a basis for revocation of this use – "constitutes a public nuisance".

As is demonstrated by the evidentiary record below, at the public hearing held in this matter on June 30, 2015, not one community resident proximate to Appellant's location testified against the continued operation nor voiced any complaint whatsoever. That complete absence of proximate community opposition and/or specification of adverse impacts allegedly proximately caused by Appellant's operations consigns to demise the Findings No. 1 through 3 of the decision below.

With regard to Finding No. 4, allegations (arrests) of misconduct are not proof that misconduct in fact occurred. There continues to be the constitutional presumption of innocence until guilt is proven beyond a reasonable doubt. The Finding No. 4 of the decision below is not supported by substantial evidence in that it does not cite to convictions or final findings of misconduct.

Finding No. 5 and No. 6 below are simply not supported by the evidence in this record in that Appellant has indeed made substantial efforts to comply with all conditions and while not demonstrating perfection, Appellant has demonstrated substantial efforts at compliance.

(A). NO SUBSTANTIAL EVIDENCE SUPPORTS THE DECISION BELOW.

There is thus no substantial evidence to support the revocation decision. Substantial evidence is evidence of ponderable legal significance, reasonable in nature, creditable and of solid value. Pennel v. Pond Union School District (1973) 29 Cal.App.3d 82, 837, footnote 2, 106 Cal.Rptr. 817. The reviewer must then examine not just the evidence in support of the administrative decision, if any, but, rather, all of the evidence in the record. Levesque v. Workman's Compensation Appeals Board (1970) 1 Cal.3d 627, 638, footnote 22, 83 Cal.Rptr. 208. Finally, see Apte v. Regents of the University of California (1988) 198 Cal.App.3d 1084, 244 Cal.Rptr. 312, wherein the court declared that the substantial evidence test requires the reviewer to consider all relevant evidence in the administrative record, including evidence that fairly detracts from the evidence supporting

the agency's decision, and that this consideration necessarily involves some weighing of the evidence to fairly estimate its worth.

It is respectfully submitted that there is no substantial evidence in this record to support the findings of the Zoning Administrator and that the findings themselves are of no ponderable legal significance, are totally unreasonable and evidence bias and prejudice.

For over forty years, controlling authority has established that there must be a demonstrable "nexus" between disruptions in a community in the vicinity of a licensed business and that business operation in order for local government to revoke a vested right of land use and/or business operation. In other words, there must be a "nexus" between proven patron misconduct and a licensee breach of duty in order to impose liability on a licensee.

In Sunset Amusement Company v. Board of Police Commissions (1972) 7 Cal. 3d 64, 101 Cal.Rptr. 768, the court declined to impose liability upon a licensee for disturbances beyond the reasonable control of management. See also Tarbox v. Board of Supervisors (1958) 163 Cal.App. 2d 373, 329 P.2d 553.

The majority decision in Sunset Amusement, supra, did not precisely reach the question of to what extent a licensee remains accountable for off premises disturbances beyond his reasonable control because the evidence in that case clearly demonstrated that the neighborhood disturbances were indeed proximately caused by petitioner's method of operation and were within petitioner's reasonable control. However, Justice Mosk did address the instant case issue in his concurring and dissenting opinion in which he stated as follows:

> "Absent a direct and causal relationship between the nature of activities taking place inside . . . [the business] . . .and those occurring outside, and absent a showing that petitioner's encouraged or acquiesced in the disorderly conduct off the premises, licensee responsibility should not attach.
>
> "The general rule as enunciated by this court in Flores v. Los Angeles Turf Club, 55 Cal. 2d 736 . . . and . . . in Tarbox v. Board of Supervisors, 163 Cal.App. 2d 373 . . . remains sound: 'a licensee is responsible for governing only patrons' activities which are reasonably within the scope of the licensee control."

Thus the lesson of Sunset Amusement is quite clear. Only where there is no reasonable effort made by licensee to control patrons' conduct, where patron misconduct is the proximate result of that very failure of any effort and where there has been an independent act or omission of a duty to act which proximately caused that misconduct, can there be the imposition of any liability upon the licensee.

The evidence herein thus utterly fails to support the revocation. There has been no demonstrable evidence of any Appellant misconduct in the premises, no failure of any

reasonable efforts by Appellant to control patrons on the premises, no off-premises patron misconduct proximately caused by Appellant's encouragement or breach of any legal duty.

To hold Appellant liable for the misconduct of persons which he cannot foresee and cannot prevent presents a classic dilemma which is legally impossible and logically untenable.

Additionally, there was an allegation at the hearing that were "excessive" police calls for service or man hours devoted to Appellant's premises.

The reviewer's attention is respectfully directed to B.S.A., Inc. v. King County (1986) 804 F.2d 1104, wherein the court addressed that very deficiency in this evidentiary context. In the B.S.A. matter, the Sheriff's Department sought to present statistics regarding the "number of police calls to a particular location" as evidence that it was a problem location. The court quickly dispatched this statistical presentation as essentially meaningless in not providing comparative statistics with regard to police calls or occurrences at other, comparable licensed locations within the same city. The record herein is likewise fatally flawed.

With regard to compliance with conditions imposed on the operation, Appellant has made every reasonable effort to, and in fact has, substantially complied with those conditions as is set forth at Page 11 through Page 12 of the decision below – "Bar Operators' Representative – Joshua Kaplan".

As to Condition No. 8, Appellant has substantially complied by customarily having the presence of three security guards;

As to Condition No. 12, Appellant has substantially complied by having those security guards attend STAR training.

As to Condition No. 17, Appellant has substantially complied by having tables permanently fixed to the former dance floor area to preclude it being used for patron dancing and to insure that it is only used for dining.

As to Condition No. 19, Appellant has substantially complied because there are no speakers in the premises except those wired to the jukebox.

As to Condition No. 22, Appellant has substantially complied by making every effort to close the premises at the required times.

As to Condition No. 33, Appellant has complied completely.

As to Condition No. 34, Appellant has complied completely.

As to Condition No. 38, Appellant has made every effort to and continues to make efforts to comply with this condition notwithstanding that it is burdensome, unreasonable, and impractical.

As to Condition No. 39, Appellant has completely complied.

(B). APPELLANT WAS DEPRIVED OF HIS RIGHTS OF DUE PROCESS OF LAW IN THAT HE WAS NEVER PROVIDED A MEANINGFUL OPPORTUNITY BE HEARD.

It is by now axiomatic that the sin qua non of "Due Process" is "fundamental fairness" and that parties must be afforded a meaningful hearing at a meaningful time before the government deprives them of their right to engage in a lawful livelihood. Endler v. Schutzbank (1968) 68 Cal. 2d 162, 65 Cal.Rptr. 297.

It is respectfully submitted that the procedures utilized herein by the Respondents were fundamentally unfair, provided Appellant with no adequate notice or opportunity for hearing and completely impaired Appellant's right to work, earn a livelihood and pursue life, liberty and happiness. See Sailer Inn v. Kirby (1971) 5 Cal. 3d 1, 95 Cal. Rptr. 329.

As the court held in Endler, supra at 170:

> "Procedural Due Process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs and individual's freedom to pursue a private occupation."

The refusal below to provide specificity regarding the allegations against Appellant before, and even during, the Administrative Hearing coupled with the refusal to allow Appellant any reasonable opportunity to confront the witnesses against him through cross-examination or to present affirmative evidence in his own defense constitutes constitutional infirmities of such gravity that the decision below cannot possibly stand.

(C). CONCLUSION.

For all of the reasons stated herein, it is respectfully submitted that the decision below must be nullified and reversed.

Dated: August 27, 2015

RESPECTFULLY SUBMITTED,

JOSHUA KAPLAN, Attorney for Appellant