
DEPARTMENT OF EXCISE AND LICENSES
CITY AND COUNTY OF DENVER, COLORADO

RECOMMENDED DECISION

2020-BFN-0001567

APPLICANT: No. 38 Tenant, LLC
d/b/a Number Thirty Eight
3560 Chestnut Place
Denver, CO 80216

TYPE OF LICENSE: Dance Cabaret License [Renewal]

This matter was heard at 9:00 AM January 26, 2022, by Hearing Officer Macon Cowles pursuant to an Application filed by No. 38 Tenant, LLC doing business as Number Thirty Eight (“Applicant” or “No. 38”), for renewal of a dance cabaret license for premises located at 3560 Chestnut Place, Denver, Colorado 80216.

Table of Contents

Appearances and Exhibits2

Applicable Law3

Summary of Evidence and Testimony4

1. Affidavits of Neighborhood Witnesses and Parties in Interest4

2. Councilwoman Candi CdeBaca.....6

3. Andrew Palmquist, one of Applicant’s owners7

4. Jeremy Bryant, Neighborhood Witness and Party in Interest..... 10

5. Paul Riedesel, City of Denver Sound Expert..... 11

6. Daniel Ritchie, Neighborhood Witness and Party in Interest..... 13

7. En masse testimony from three neighborhood witnesses— David Fox, Pat Tjaden and Sheila Hollenbeck..... 17

8. Andrew Palmquist, called for rebuttal 18

Findings of Fact..... 18

1. The need and desires of the residents of the designated neighborhood do not support the issuance of the cabaret license 18

2. The reasonable requirements are met by seven other cabaret licenses in the designated neighborhood..... 23

3. Renewal of the the license will likely have a negative impact on the health, welfare and morals of the designated neighborhood 23

4. No. 38 is unlikely to operate lawfully if the cabaret license is renewed..... 24

Conclusions and Recommendation25

Certificate of Service26

APPEARANCES AND EXHIBITS

1. **Appearances.** The Applicant is represented by attorney Robert Runco, Esq. The Denver Department of Excise and Licenses (“the Department”) is represented by Assistant City Attorney Katie Conner, Esq. Opponents of the Application were represented by Tom Downey, Esq. No one appeared on behalf of the Police District in which Number Thirty Eight is located.

2. Denver City Councilwoman Candi CdeBaca was present for most of the hearing, as were Jessica Zender, Ms. CdeBaca’s Community Engagement Co-lead, and Liz Stalnaker, Ms. CdeBaca’s Constituent Services and Communications Director.

3. **Exhibits.** The Hearing Officer received, without objection, the following exhibits that the parties submitted during the hearing:

Exhibit No.	Item
A-1	Petitions of 30 business owners or managers or residents in support of renewal, though two of those signatures were by Affiants Zach Rabun and Carlo Gonzales
A-3	Affidavit of Lance Peterson, 3636 Chestnut Place, Denver, CO 80216
A-4	Affidavit of Edith Anesi, 3500 Chestnut Place, Denver, CO 80216
A-5	Affidavit of Teresa Ortiz, 3624 Delgany St., Denver, Co 80216
A-6	Affidavit of Tracy Weil, 3611 Chestnut Place Denver. CO 80216
A-7	Affidavit of John Deffenbaugh, RiNo Art District, 3525 Walnut St, Suite 40, Denver, CO
A-8	Affidavit of Carlo Gonzales, 3515 Delgany St., Denver, CO
A-9	Affidavit of Dean Koelbel, 3515 Brighton Blvd., Denver, CO
A-10	Affidavit of Michael Tignanelli, 3636 Chestnut Place, Denver, CO 80216
A-11	Affidavit of Zachary Taylor Rabun, 3501 Delgany St., Denver, CO 80216
C-1	Email notification dated January 10, 2022 (2 pages) of the Application to City Councilwoman Candi CdeBaca, to several registered neighborhood organizations and to numerous individuals
C-2	Daily Journal Publisher’s Affidavit showing that the notice of the hearing was published January 13, 2022 , and notifying all interested parties of their right to appear at the hearing on the license renewal
C-3	Map of designated area pursuant to <i>HP&P</i> §2.1.1.1
C-4	Liquor License Report on the designated area, showing the following existing licenses:

	Art Gallery Permit..... 1
	Beer & Wine 2
	Cabaret..... 8
	Distillery Pub 1
	Hotel & Restaurant..... 1
	Retail 2
	Tavern..... 2
	Vintner’s Restaurant 1
C-5	Floor plan of the licensed premises (2 pages)
C-6	Posted Notice and verification, showing the text of the notice and verifying that it was posted January 13, 2022
C-7	Renewal Hearing Order dated September 28, 2021
C-8	January 24, 2022 letter of the Councilwoman for the District in which Number Thirty Eight is located, Ms. Candi CdeBaca.
O-1	Spreadsheet with sound volume measurements made by Daniel Ritchie and others.

4. Applicant offered an additional affidavit, Ex. A-2, but A-2 was not received as the non-printed parts of the purported affidavit are illegible.

APPLICABLE LAW

5. The *Excise and Licenses Hearing Policies and Procedures* (October 22, 2018) (“*HP&P*”) supplemented by the temporary modification of the *HP&P* (“*HP&P-Temp*”) dated May 1, 2020 contain the policies, procedures and rules that govern this hearing.

6. **Posting and Notice.** D.R.M.C. 6-53(b) and *HP&P* §9.4.1 require that in the case of an application for a new cabaret license, the notice of public hearing be posted “for a period of not less than thirty (30) consecutive days, in advance of the public hearing.” There is no requirement in the D.R.M.C. or the *HP&P* for publication of the notice. The Order, Ex. C-7, of the Executive Director requiring a hearing on the renewal of Applicant’s cabaret license directed that the “procedure and requirements for the renewal hearing shall be the same as those for a new dance cabaret license.”

7. **Posting and Notice in the event of a rescheduled hearing.** Where a hearing is rescheduled, as this hearing was, posting for 30 days is not required, but rather “The Applicant shall amend any applicable posting to reflect the rescheduled date and time of the hearing as provided in the Order. Posting notices shall remain in place for a minimum of ten (10) days once the notice has been amended, or for as long as is otherwise specified by the Order.” *HP&P* §1.6.3.9.3.

8. **Cabaret License.** The issuance of cabaret licenses is subject to D.R.M.C. Chapter 6, Article III, §6-31 et seq. A “cabaret” is a “business licensed to sell alcoholic beverages...which offers or provides entertainment for patrons or guests.” D.R.M.C. 6-31(2).

9. **Dance Cabaret License.** A “dance cabaret” is more specifically defined in section 6-32(2) of the D.R.M.C. as follows:

A cabaret in which either live entertainment or recorded entertainment or both is provided and in which patron dancing is permitted. No entertainer shall dance with any patron or guest. No person under twenty-one (21) years of age shall be employed or permitted to participate as an entertainer in a dance cabaret without the written consent of a parent or guardian or the written approval of the director.

10. As related to cabaret licenses, D.R.M.C. 6-53(c) and *HP&P* §9.5.2 require the Hearing Officer to consider:

- a. The need and desires of the residents of the designated neighborhood for the issuance of the cabaret license;
- b. The reasonable requirements of the designated neighborhood for the issuance of the license, taking into account existing cabaret licenses; and
- c. The effect that issuance of the license will likely have on the health or welfare or morals of the designated neighborhood.

11. A further requirement is that the Applicant show that if the cabaret license is issued, the premises will be lawfully operated. See D.R.M.C. §6-52(a)(9) and §6-55(a)(3).

D.R.M.C. §6-55(a)(3) states that “No cabaret license shall be issued when:

* * * *

The information or evidence available to and considered by the director reasonably established: that the character or reputation of the applicant or manager of the establishment or business or the past record of operation of the establishment or business for which application is made is such so as not to warrant the confidence of the director that the establishment or business will be lawfully operated; or that the health or welfare or morals of the neighborhood would be adversely affected thereby; or that the applicant has failed to establish that the residents of the designated neighborhood desire the granting of the license and that the cabaret licenses of the same class in the designated neighborhood are inadequate to serve the needs of the designated neighborhood.

12. Approval or denial is vested in the sound discretion of the Director, §6-53(d).

SUMMARY OF EVIDENCE AND TESTIMONY

1. Affidavits of Neighborhood Witnesses and Parties in Interest

13. *HP&P* §3.5.1(ii)(a) requires that the Applicant “present at least one Neighborhood Witness (other than the Applicant) to provide testimony establishing the need and desire of the neighborhood for the license to issue.” *HP&P-Temp* 10.5.1.1 permits those witnesses, during this time of the COVID pandemic, to be presented through affidavits.

14. The Applicant presented the affidavits of nine neighborhood witnesses, each of whom asserted that there is both a need and desire in the designated area for the modification requested in the Application and that granting the Application will not negatively impact the health, safety, or morals of the neighborhood. Those witnesses are:

- a. Lance Peterson, 3636 Chestnut Place, Denver, CO 80216. He is a 61-year old business owner and states that the entertainment experience offered by the Applicant is right line with what businesses in this part of Chestnut Place are trying to create. Ex. A-3.
- b. Edith Anesi, 3500 Chestnut Place, Denver, CO 80216. Ms. Anesi is a 39-year old business owner who states that the cabaret license is good for the neighborhood, that it is a great benefit to the surrounding community and that it will “drive more foot traffic to the businesses, the new park and the forthcoming promenade. It is family and dog friendly, providing drinks, food and live entertainment indoors and outside.” She says that “Local workforce and residents alike benefit to having a fun and responsible neighbor like the owner/operators of Number 38.” She says that “No. 38 provides “indoor/outdoor spaces, recreation, food and drink all while being family/kid/dog friendly which is needed in this neighborhood. This neighborhood is not fully developed and we need establishments like No 38 to keep the vibrancy and development moving forward.” Ex. A-4.
- c. Teresa Ortiz, 3624 Delgany St., Denver, Co 80216. Ms. Ortiz is a 25 year old resident who strongly believes that No. 38’s cabaret license should be renewed “because the establishment offers “our community inclusive live entertainment responsibly and safely.” It delivers “a one-of-a-kind experience to our neighborhood.” She does not believe that renewing the license will have an adverse impact on the health welfare or safety of the neighborhood “because number 38’s management is extremely considerate, responsible, and inclusive of their neighbors.” Ex. A-5.
- d. Tracy Weil whose address is 3611 Chestnut Place Denver. CO 80216 is a 55-year old resident and a business owner who favors renewing the cabaret license. She says that “No. 38 has been doing a good job working with area neighbors,” and that it has been “a nice addition to the neighborhood.” Ex. A-6.
- e. John Deffenbaugh, RiNo Art District, 3525 Walnut St, Suite 40, Denver, CO is a 42-year old business manager. He states that No. 30 “offers opportunities for local musicians and DJs to perform.” He does “not believe the issuance of the license will have a detrimental impact on the health, welfare, and safety of the designated area [because] [t]he venue has operated successfully with negligible impact to surrounding neighbors.” He states that the RiNo Art District and the BID and GID all support the renewal of the license. Ex. A-7.

-
- f. Carlo Gonzales, 3515 Delgany St., Denver, CO is a 35-year old resident of the designated area. He believes that there is a need for the license and that “it complements the neighborhood.” He thinks there should be more cabaret licenses in the neighborhood. Ex. A-8.
 - g. Dean Koelbel is a 33 year old business owner at 3513 Brighton Blvd., Denver, CO. He personally desires the renewal of the license and feels that it will not have an adverse influence on the health, safety, and welfare of the designated area. He thinks there are not enough venues for live music in the area. Ex. A-9.
 - h. Michael Tignanelli is a property owner of 3636 Chestnut Place, Denver, CO 80216. He personally feels that there is a need for the renewal of the license to benefit the neighborhood and support the local economy. There are a lot of residential units under construction and so the area will benefit from the renewal.
 - i. Zachary Taylor Rabun is a business owner at 3501 Delgany St., Denver, CO 80216. He personally desires the renewal of the license because number 38 has been “a great addition to our local neighborhood and provides great music, food, and beverage.” He believes that the Brighton Boulevard portion of the RiNo neighborhood is underserved by venues like number 38. It is a well-built, well-maintained and well-managed operation that will continue to be an asset to the local area. The RiNo neighborhood is growing quickly and needs more cabaret licenses to meet the demand.

2. Councilwoman Candi CdeBaca

After being first duly sworn, Councilwoman Candi CdeBaca testified as follows:

15. Councilwoman CdeBaca is the Denver City Councilwoman who represents District 9, in which No. 38 is located. She opposes the renewal of the cabaret license. She read the letter that is Ex. C-8. Having followed the noise complaints and negotiation between complainants and the operator over the previous 14 months, she “does not have confidence that Number 38 can or will remain within the decibel levels specified by Denver’s noise ordinance after this period of scrutiny has passed.”

16. Any member of City Council is authorized to testify about her position on the Application and to convey information about how residents of the Council district feel about the Application. The letter, Ex. C-8, and testimony of Councilwoman Candi CdeBaca, however, is entitled to no evidentiary value, *HP&P* § 3.5.1.1(iii), without testimony that she lives within the designated area. There is no evidence that Councilwoman CdeBaca lives within the designated area.

3. Andrew Palmquist, one of Applicant's owners

After being first duly sworn, Andrew Palmquist testified as follows:

17. Andrew Palmquist is a business owner and the Chief Operating Officer of Applicant No. 38 Tenant, LLC. He has been managing No. 38 since October 9, 2020 when the business opened.

18. The hearing was originally scheduled for December 15, 2021 and then was continued to today's date. The notice of the originally scheduled renewal license hearing was posted on the business premises continuously from November 15 through December 15, 2021. The notice of the hearing today has been posted on the premises for ten days.

19. Mr. Palmquist is at the business every day. They have had no law-enforcement contact since opening. He has received complaints from neighbors, texts and phone calls. In March 2021, No. 38 participated in mediation with neighbors who had complaints. They wanted to hear the concerns of neighbors. The operators of No. 38 have made a number of infrastructure and operational changes to mitigate the sound complaints of the neighbors. Initially, all of the music was outside. In response to the complaints, they have changed to smaller bands, fewer drums and then no drums in the bands. They also have an interior stage and most performances now are inside.

20. Everyone is vaccinated who enters the premises. That is true of employees as well as patrons. They look at the MyColorado App proof of vaccination or a physical proof of vaccination. They look at the dates and fully vaccinated status is indicated by more than two weeks having passed after the second Moderna or Pfizer vaccines or a single dose of the Johnson & Johnson vaccine.

21. They have hired sound professionals to give them advice about how to reduce the impact of sound on the neighbors. The subwoofer was a source of complaints, so they changed that. They went to in-ear monitors for the musicians rather than monitors that were on the stage that projected sound toward the neighbors. March 29 is when most of the changes were made. They are consulting with acousticians. Using the sound level readings taken by Paul Riedesel in December 2021, they now have a permanent sound level microphone which sends decibel level readings directly to the mixing booth during performances. If the sound reaches a certain level, they adjust the volume and bring it down. They are aiming for a sound level that is 5-7 decibels below the legal limit. These are expensive changes. They will continue to monitor the situation and try to improve it.

22. They have now bought a sound box that surrounds the drum set. They will use this to reduce the sound from drums. Under construction is a 12-story building directly to the south. The first four floors of that building will be parking, and that will attenuate the sound.

23. No 38 also extended the wall behind the stage. It was a short wall, a stub wall, but this concrete masonry wall has been built all the way up to the same level as the wall of the building. So the wall is now higher than it was.

24. In addition to the sound wall, they have put in sound paneling around the stage, sound dampening at the bottom of the stage to reduce the sound from bouncing off hard surfaces. They are not finished addressing this. They would like to implement additional improvements that make it better for the neighbors. However, at the moment they have no specific or major infrastructure changes that are planned. Then he mentioned the drum box that they have purchased.

25. The 12-story apartment building that is being built next door on the southside of No. 38 is going to have ground floor restaurants and retail and the first four floors will be devoted to parking. That building will change how sound is dispersed into the neighborhood.

26. He is not sure when the mediation was completed. They had a discussion with the neighbors about their sound complaints and No. 38's infrastructure plans for changes were disclosed. It is true that Mr. Bryant is closest to No. 38. He would consider putting in a permanent and continuous sound monitor on Mr. Bryant's deck, but is concerned about the interpretation of the data. They are not the only source of noise in the neighborhood. Right now, there is a pile driving going on in connection with the construction of the 12-story building. Then he mentioned Kumas, a bar that plays heavy rock and metal music, a Mockery Brewery and the Ironton Distillery which have outdoor music, River, which sometimes has an outdoor DJ and the RiNo Art Park which has outdoor events.

27. The wall whose height was extended is now about 17 to 20 feet in height, built in the summer of 2021. The last mitigation that No. 38 did was when Paul Riedesel during the first weeks of December 2021. No. 38 calibrated the stage mic with Paul Riedesel's readings from Jeremy Bryant's deck.

28. No. 38 does have four garage doors, and they open and shut all the way to the ground level. They garage doors have triple paned glass which provide good insulation. No. 38 opened October 9, 2020. 1,200 persons is the capacity of the facility, inside and out, pursuant to code. 750 is the practical maximum operating capacity. At the end of the pandemic, they hope the traffic will be more constant. The facility is designed so that inside they can handle about 435 people and outside they can handle 780. The size of the total facility inside and out is 18,000 ft.². The stage is 20 feet deep by 40 feet wide. The outside premises are approximately 115 to 120 ft.².

29. Mr. Palmquist pointed out a transformer at the back of the stage on the floor plan and said that Jeremy Bryant's house is about 18 feet away from the transformer, across the width of an alley. The 12-story apartment building is going to the right of what is shown on the plan. And the first four stories are parking.

30. No. 38's hours of operation are 4 PM to 11 PM on Thursdays and Fridays and 11 AM to 11 PM on Saturday and Sundays.

31. They have live artists on stage every day that they are open. They want to create a kind of Nashville style and experience. The bands are free and open to the public.

They generally have bands playing from 6 to 8 PM on Friday and Saturday. On Saturdays and Sundays, they start a set at 1:00, another at 4:00 and a third at 6:00 or 7:00 PM.

32. Mr. Palmquist says that he does understand the sound limits that are in Chapter 36. And he understands that sound levels for purposes of enforcing Chapter 36, or taken from the nearest residential property. Asked if the business could operate keeping all of the bands inside only, Mr. Palmquist said it would be tough to operate without an outdoor stage. But they will try to program shows in compliance with the sound ordinance.

33. Mr. Palmquist admits that the pile driving involved in constructing the apartment house next-door does not occur after 10 PM. It is done mostly in the daytime hours. Construction does go till 8 PM some nights. And he was aware of no other venues in the neighborhood that have had noise violations or complaints from neighbors.

34. The hearing on the cabaret license when it was originally issued was in June 2020. Some of the same neighbors that are concerned now we're concerned even back then at the hearing. And at that June 2020 hearing, Mr. Palmquist promised that sound would not exceed 55 dB. The complaints did start in the fall of 2020. After they opened, they did make sound measurements in response to the complaints, taking sound measurements in the alley. But based on No. 38's sound measurements, he thought the neighbors were experiencing something different. The neighbors continued to complain, and then everyone agreed to do mediation. The mediation occurred in March. It was the neighbors who brought in the mediator. No written agreement was reached. But No. 38 did make some infrastructure changes after that.

35. Though the neighbors were complaining from October 2020 until the completion of mediation in March, we "felt we were in compliance." They wanted to reconcile the differences between the readings No. 38 was getting and the readings of the neighbors.

36. Asked why it took until March 2021 for No. 38 to get a third party involved to say who was right in the matter of sound measurements, Mr. Palmquist says that those were difficult times, and that the neighbors were asking a lot of us. No. 38 had not received a ticket. And there were huge Covid restrictions. No. 38 was operating at only 10-15% of capacity. In addition, consultants are expensive, costing \$1500-\$1700 and No. 38 felt they were within the city noise restrictions. The city had not cited them. And No. 38 did reduce the base level, which was the biggest complaint, mainly of low frequency sound coming from the subwoofer. But it is true that in the fall of 2020 in the spring of 2021, he did not ask the neighbors if a third-party could come to take sound measurements.

37. After raising the height of the wall, months went by without complaints. Some neighbors said the situation was better. But in the summer of 2021, No. 38 received a notice that the neighbors were asking for a hearing. That caused No. 38 to try to get the city involved. It took a few months to line up Paul Riedesel. And the No. 38 did feel that progress was being made.

38. They did not completely eliminate the use of drums by bands. But they did strip down the drum set of the bands. That was reflected in their contracts. The garage doors

can be opened and allow the passage of patrons from the inside to the outside, it connects the indoors and outside space. The garage doors are energy compliant, triple pane, heavy.

39. Mr. Palmquist was not able to promise that even with all these changes they would never go over the sound permitted by Chapter 36. But they are going to calibrate the volume levels. Mixing is a process of mixing multiple inputs. It is not a set and forget situation. No. 38 wants to be good neighbors. But they also want to run a successful business.

40. Responding to Mr. Runco's questions, he says that they have redirected the inside speakers. When the neighbors complained, No. 38 thought that they were compliant. But they made adjustments. They have made changes that they thought would be effective to keep the sound at 55 dB or below. There are additional things that might improve the sound. They will add improvements. The neighbors complained about the bass sound, and they addressed it with the changes in the subwoofer. If the city puts operating restrictions on the cabaret license, No. 38 would comply.

41. Responding to Ms. Riedsorph's questions, he describes the location where bands set up when they are playing inside. It is at the lower right of the inside space on the first page of Ex. C-5. He agrees that it is his responsibility 100% of the time to be compliant with the Denver noise ordinance.

4. Jeremy Bryant, Neighborhood Witness and Party in Interest

After being first duly sworn, Jeremy Bryant testified as follows:

42. Jeremy Bryant lives at 3527 Delgany St., No. 5, Denver, CO 802016. His residential unit is the closest of any residential unit to No. 38. Renewing the cabaret license to No. 38 will have a negative impact on the health, safety and morals of the neighborhood and he opposes it.

43. Thursday through Sunday, Mr. Bryant can hear the live music throughout his house. Sometimes his house shakes from the sound. There is no room into which the music does not penetrate. Late at night, usually the music ends, but people who are patrons of No. 38 stay outside. There's evidence of No. 38's exceeding the city noise limits. It was at Mr. Bryant's home, on the rooftop deck, from which Paul Riedesel made his sound measurements in December 2021.

44. The sound mitigation efforts described by Mr. Palmquist have made a difference. It is not as extreme as it was prior to the mitigation efforts. Asked how recently sound had disturbed him, he said it was the previous Sunday at 11 PM but he says that he cannot say the noise that night was coming from No. 38.

45. Mr. Bryant lives in a single family townhome that was built in the late 2015. He purchased it in June 2020. It has changed in that they built a wall behind the stage, and that helped. There's "no doubt" that it is better with the mitigation steps they have taken. But the starting point was a major disturbance, "as bad as it gets" and now it has become a "less extreme disturbance." Mr. Bryant is 34 years old. He does have a 9 to 5 job that is very

demanding and during the pandemic the music has disturbed his work at home at times. He sells technology for self-driving cars, working for a company out of the Bay Area. He is vice president of sales.

46. He opposes the renewal even if the music were limited to the indoor premises. The music has mostly been indoors this winter, and that has generally not been an annoyance. But they do have garage doors, and those garage doors could be opened up to let the sound flow to the outside.

47. Before moving to Unit 5, he lived at 1111 Osage Street near the Santa Fe Arts District and there was a light rail stop at 10th and Osage, one block away. His window and residence were 100 feet from the light rail which passed by every five minutes. He grew up in Thornton.

5. Paul Riedesel, City of Denver Sound Expert

After being first duly sworn, Paul Riedesel testified as follows:

48. Paul Riedesel is the City's noise and acoustic expert. He's the lead in the City's noise program. He has been employed by the City for twenty years. He has an extensive background and a lot of experience with sound measurements and the Denver noise ordinance. He attended a training and certification program in environmental noise at Rutgers University. He is not taking a position on whether No. 38's cabaret license should be renewed.

49. Chapter 36 is in the section of the DRMC that protects the health and welfare of Denver citizens, and supports people's ability to enjoy their property without being unduly disturbed by noise. When sound emanates from business premises and the complainant experiences it at a residential property, he takes sound measurements from residential property at the location where the sound would be the loudest. That is where he sets up his equipment and takes measurements. The Denver noise ordinance allows levels of 50 dB from 10 PM to 7 AM and 55 dB from 7 AM to 10 PM. This is measured at the property line of the residential property. If the background level of noise, the "L-90," is higher than 50 or 55 dB, then the noise limit in Chapter 36 is that higher L-90 background noise level.

50. During Covid, the noise program of the City and County of Denver was shut down. There was no good avenue during that time for citizens to lodge noise complaints. However, he became aware of a complaint involving this property on Monday, November 16, 2020 and he understands that there had already been multiple prior complaints.

51. The initial complaint of a neighbor against No. 38 that came to his attention arose on November 16, 2020. When he first saw the site as a result of that complaint, Mr. Riedesel did not think that outdoor concerts would be possible at that location without violating the noise ordinance. During his first site visit, he ascertained where the residential properties were in relation to the sound source. He viewed the premises and where the audience would be seated outside.

52. There is an expectation by people attending concerts of what the sound coming from the musicians will be like. Stadium concerts are pumping out about 120 dB of sound. At smaller venues like this, patrons would expect sound levels from 90 to 100 dB, experienced by those in the audience who are furthest from the sound stage, in order to have a concert type, satisfying experience.

53. What is striking about No. 38 is that the residential property is much closer to the soundstage than other music venues. In fact, the closest residential property at this site is closer to the No. 38 sound stage than persons at the back of the intended audience in No. 38's outside area.

54. Mr. Riedesel spoke to Spencer Fronk on November 16. He discussed the sound limits and that it might not be possible to be compliant and still provide an experience that would be enjoyed by the No. 38 patrons. Mr. Riedesel recommended moving the music indoors. He concedes that if the owners have enough money, you can engineer your way out of this, to and including completely enclosing the outdoor area.

55. **Sound measurements taken June 24, 2021.** The next time he received a complaint about No. 38 was from the Department of Excise and Licenses. Brian Snow, who works for that department called to tell Mr. Riedesel about the complaint and that there would be a hearing on the license renewal. On Friday, June 24, 2021, Mr. Riedesel went to the site. Jeremy Bryant and Daniel Ritchie were both there. They said that they were making a complaint about the noise coming from No. 38. Mr. Riedesel went to Jeremy Bryant's deck to take the measurements. He determined that that would be the loudest spot. It is the most direct, and closest place to the sound source at which the sound from No, 38 would be experienced. He estimates that Mr. Bryant's deck is about 1 foot from the property line across the alley from No. 38.

56. He took sound measurements between 6:30 and 7:00 PM on that Friday, using a Type II sound meter. A band was outside playing at No. 38. He recorded peak sounds of 76.7 dB. "The background noise is an acoustic term we call the L-90." It's the background noise level present 90% of the time while a reading is taken, but it does fluctuate. The L-90, was 60.1 dB at the time of his measurements. The decibel scale is a log scale, so the jump from 60 to 70 dB means the sound would be twice as loud. So 76.7 dB is roughly 3 times what is allowed by the Denver noise ordinance at 6:30 to 7:00 PM on a Friday. He issued a written warning to No. 38.

57. **Sound measurements taken December 3, 2021.** After that, No. 38 did reach out. As a result, on Friday, December 3, 2021, Mr. Riedesel went to the site and took measurements again, while a band was playing. He noticed that there was sound mitigation that had been installed, including increasing the height of the wall behind the sound stage and the additional acoustic material he could see around the sound stage. He took measurements from Jeremy Bryant's deck, while another investigator, Nathan Rosenberg, was inside No. 38 communicating with a technician at the sound board. As the band played, Mr. Riedesel recorded the sound levels and relayed them to Nathan. The L-90 background level was 58.6 dB. As the sound level was relayed to Nathan, No. 38 turned down the volume of the band until they were able to get it down to the same level as background. That is to say, they got the sound level of the band down to where it was indistinguishable from

neighborhood sounds, the background sound level. L-90 constantly fluctuates. When the sound from the band became indistinguishable from the background noise level, Nathan was getting a reading of 70 dB at the position from someone seated or standing “in the pit” where an audience member would be, near the sound source. This is “notably lower” than a concert goer would normally expect as a satisfying experience. And that was with only a dozen or two dozen people in the audience at that time.

58. The sound as measured in December was about 10 dB lower than what they had measured in June. He thinks the most likely cause for this drop was getting rid of the monitor speakers on the stage that would project sound directly toward the residential units.

59. When he took his measurements, Mr. Riedesel was not able to hear any music above background sound coming from locations other than No. 38. He did not take measurements when there was a band playing inside No. 38. And he did arrive before the band began to play at No. 38, and he was not able to discern any other bands from other venues that could be heard above the background sound. But it was only 46°, so it was unlikely there would be other bands playing outside elsewhere at that temperature.

60. He acknowledges that triple pane windows with gas in between the panes are pretty good mitigation for sound coming from inside. But when he spoke to Spencer in November 2020, Mr. Riedesel told him he thought that sound mitigation could be done more effectively to keep the sound within the code limits if the bands played inside with the garage doors closed.

61. Even with effective sound mitigation, there is no guarantee that No. 38 will be able to have bands play outside without violating the noise ordinance.

62. Mr. Riedesel says that in enforcing the noise ordinance, the City just looks at the numbers. He did say that the least amount of sound someone expects, a person sitting at the back of the venue, is about 90 dB. If No. 38 operates at the levels that Mr. Riedesel measured and established with them in December, they would be in compliance with the noise ordinance. That night, at that time, they were compliant. As long as the dB level stays at 55 or below they are compliant.

63. Noise complaints are not per se a violation. He has investigated complaints where there was no violation. While difficult, No. 38 could operate in compliance with the noise ordinance. It is a matter of volume.

64. Type I or a Type II sound measuring equipment are allowed under Chapter 36 as instruments that can measure sound. Injunctive relief is not a tool that the City can use in enforcing the noise ordinance. The City can seek fines for noise ordinance violations up to \$5,000. The City can also write general violations as well as administrative citations.

6. Daniel Ritchie, Neighborhood Witness and Party in Interest

After being first duly sworn, Daniel Ritchie testified as follows:

65. Daniel Ritchie lives at 3527 Delgany, No. 2, Denver, Colorado. He was raised in east Pittsburgh and he is 40 years old. He moved into this unit in May 2016. He

owns the property, and lives and works in it. He is a consultant for tech companies. Mr. Ritchie was present at the original hearing in June 2020 for issuance of a cabaret license. It was clear then that this large outdoor stage with capacity for 1,000 people was not conducive to the adjacent residential properties. Some of their bedrooms are closer to the stage than audience members. They expressed the view that approval of the license would make life unlivable. They were afraid that the sound from the stage would make it unlivable for the residents living in the adjacent properties. At the hearing on issuance of the cabaret license, No. 38 promised that they would have music on two times a week, but that the music would be finished at an early hour. and that the music would be “primarily acoustic.”

66. The initial experience that they had with No. 38 is that he would make calls to No. 38 and would not receive calls back responding to his concerns. They also made calls, sent email and texts to various people at No. 38. Immediately, when the music began, it was “unbelievable.”

67. Before October 9, 2020, there was a volleyball league that would play on the volleyball courts, and they played music from a boom box. Leading up to the opening, he and other neighbors were optimistic that it would work. But when the first band after No. 38’s opening began to play music, the neighbors gathered in the alley and decided that there was no way that this would become livable. The neighbors contacted the owners of No. 38, and told them that this has got to change. He contacted the owners and got no response for months.

68. Prior to opening, Spencer arrived at Mr. Ritchie’s door and invited him to the opening party. Mr. Ritchie told Spencer that the neighbors are concerned and something has to be done about it. This occurred around October 1. The first call Mr. Ritchie made to 311 was prior to opening when No. 38 was doing sound checks with bands. The recording on the City’s end of the 311 call said they were not then taking noise complaints. So then Mr. Ritchie began to reach out to the owners of No. 38. He took measurements in the 60 dB range. He asked No. 38 to contact him to discuss doing something about this.

69. One of their neighbors, a couple with two young daughters, moved from their unit because of the noise.

70. What he received as a response to his importunities was a promise that No. 38 was going to hire a sound engineer and build a wall and take some other measures, but those did not materialize. Mr. Ritchie himself hired a sound engineer in December 2020, who said that a wall would reduce sound by about 20 dB. The promised wall was wind damaged, and stayed so for about 8 months, and was neither fixed nor raised.

71. He described the impacts on his life and work: the noise was incompatible, home is a retreat, where one should be able to find comfort and security. He could not find any place in his home where he could escape the sound, when friends are over for dinner, 6 or 8 people, and they are doing the dishes afterward, even then the music from No. 38 is audible. You can hear it when you are in the shower, when working and thinking of issues or during work conversations, there is the sound and thumping in the background. They all have rooftops, but the No. 38 music is so loud that Mr. Ritchie cannot hear his own music, and it is a problem at night at times when trying to sleep. He broke his ankle and during the

healing at home, the music always intruded times of rest. He has asked himself whether life in his apartment is possible, and he has concluded it is not without a serious response from No. 38.

72. He has chosen urban living and his complaints are in that context. On No. 38's own website, it said that No. 38 is trying to emulate the Red Rocks experience. Ironton Distillery, Mockery Brewing, Kumas Corner, the heavy metal bar etc.—he and his neighbors do not have those impacts from these other venues. A couple of times a year, he may be annoyed by them, but not to the point here, where it is egregious. Urban living has been distorted by No. 38 into an experience that is literally living back stage in a concert hall.

73. From January 1, 2021 through the mediation, they were promised the wall and the in-ear monitors, hiring someone to work on this—but all failed. These were temporary solutions that did not resolve the issue. And then the neighbors get the same conversation from No. 38: we want to help and want to solve this. The neighbors appreciated the change with the subwoofer to address the base sound. But the one thing the neighbors have are the decibel limits imposed by the City. That is all they are asking, these two things.

74. From January through mediation in March, the experience has been consistent: interrupted at work, intimate moments, whether listening to a song or an intimate moment with a lover, you are constantly bombarded and interrupted.

75. Mr. Ritchie purchased decibel meters that meet the same standards that Denver requires. The first is a mic that works with a cell phone and is a Type I. The second is a calibrated certified Type II sound pressure meter, an American Recorder SPL-8810. He uses the Type II for these measurements. Mr. Ritchie got involved in sound and music competitions for sound quality and volume 22 years ago. He has always loved music. He also reached out to Paul Riedesel to find out what type of equipment he should use. Mr. Ritchie has a calibrator and does calibration before and after taking readings.

76. Ex. O-1 is a spreadsheet with the sound readings that he took at various times and dates. Where "Neighbor" is listed in the first column, it indicates that a neighbor who does not want to be identified reported the level. The decibel level reported in the fourth column is the high reading that was recorded at that time. Ex. O-1 was received in evidence over the objection of Mr. Runco.

77. After mediation, from spring 2021 to the present, the concerts have continued. And the impacts on livability and the ability to do work in his home has remained the same. Comparing year to year changes from 2021 to the present, the last few weeks there's been less impact to livability, the frequency and severity has declined, but it is winter.

78. Since No. 38 began to operate with outside bands under its cabaret license, there has been a negative impact to the health safety and morals of the neighborhood and it will continue to adversely impact the health safety and morals of the neighborhood as long as No. 38 continues to operate as it has.

79. Asked by Mr. Runco, Mr. Ritchie said that he and the neighbors had immediate concerns after they opened, and he communicated with No. 38 immediately. The neighbors contacted a mediator in November 2020, because they felt they were not seeing the movement from No. 38 that they wanted.

80. What they requested of No. 38 outside of the mediation were to stop the excessive noise levels, above the legal limits, and the problem with the bass. However, in late summer 2021, Mr. Palmquist said they would not replace the subwoofer. Based on his experience, he thinks they did replace the subwoofer in the late summer or fall 2021.

81. Mr. Ritchie provided the sound readings to No. 38, but No. 38 owners did not believe the readings. Or they told Mr. Ritchie that the sound was from another source. After the mediation, No. 38 took some steps to remediate. And they made other promises similar to promises they have made before. The sound readings on the first page of Ex. O-1 were taken before the wall height was raised. Mr. Ritchie was traveling for work from July 2 until mid-September, spending only two or three days at home during that time. That is why there is a three month gap in the readings recorded on Ex. O-1.

82. The promises and intentions that Mr. Palmquist expressed during this hearing are the same things that he has heard from them before.

83. Forty-four of the measurements on Ex. O-1 are verified measurements. Two-thirds of the measurements he took were taken from the roof of his unit. Other times he took readings from Unit 5. Paul Riedesel's measurements taken on Jeremy Bryant's deck would have been at the position of the word "Way" in "Right of Way" at the upper right corner of p. 1 of Ex. C-5, above the red line denoting the plan north boundary of the licensed premises.

84. He has spent hundreds of hours on the sound issue with No. 38, tens to hundreds of phone calls, texts and emails, researching, identifying and buying equipment. He has spent more than \$1,500, about \$1,000 just on the professional sound equipment. The time spent: he has taken more than 60 sound measurements, has made all the attempts to communicate with No. 38, and with neighbors on how this could be solved. All of the time represent an unbelievable burden, and they are shocked that one has to go through this much to have this resolved.

85. Yes, he is opposing the issuance of the cabaret license in its entirety.

86. Answering the Hearing Officer's questions, the five residential units under discussion and adjacent to No. 38 are attached row homes, one attached to the next from Delgany Street to the alley. They are three stories, each with a rooftop deck.

87. Other neighbors were bothered by the volleyball noise, but Mr. Ritchie was not. In an attempt to get through to the current owners of No. 38, Mr. Ritchie reached out to prior owners of No. 38, to relatives of the owners, to the RiNo Arts District. He received no response from No. 38. When Spencer appeared at his door to invite him to the opening, at that point there were five days when the sound already was unbearable. "We are spending money, we are hiring a sound engineer, we are doing everything we can without bankrupting

our business” are the responses that he continued to hear thereafter. The neighbors kept saying we need to address this, and No. 38 did make some changes, which is appreciated, but the sound is still exceeding the levels permitted by the City. The owners of No. 38 continued to say, “we need time for the sound expert, we need time to build this thing, time to do these things.” Time passes, and still the problem is not resolved, and the impact of No. 38 has not been mitigated.

7. En masse testimony from three neighborhood witnesses— David Fox, Pat Tjaden and Sheila Hollenbeck

The en masse witnesses were duly sworn and then testified as follows:

88. David Fox and Pat Tjaden own two residential units at 3513 and 3515 Delgany Street, Denver, Colorado. The Fox-Tjaden property is fifty feet away from Mr. Ritchie’s and Mr. Bryant’s property. Sheila Hollenbeck and her husband Lee Roger Hollenbeck, who was present during most of the hearing, but was time constrained and so not present for the en masse testimony, own a residential unit that is 3527 Delgany, No 3, Denver, Colorado.

89. The cabaret license and concerts at No. 38 negatively impact the livability and workability of life within their units. If the cabaret license is renewed, it will negatively impact the livability and workability of their units.

90. They oppose the renewal of the cabaret license of No. 38.

91. If the cabaret license is renewed, it will negatively impact the health, safety and morals of the neighborhood.

92. Pat Tjaden added that before the cabaret license became effective, she spoke with Spencer and asked him if they could call him if the noise were too high. Spencer said yes, definitely, that he is there every night. Two or three times while in bed and the house was shaking with the sound, she tried to get hold of Spencer, but he was always unavailable or the person who answered the phone said they would go get him, but he never responded or was available.

93. Sheila Hollenbeck was at the hearing when the license was issued originally, and she remembers the promises of the owners of No. 38 that there would be limited performances, that it would only be acoustic music—not amplified, not electronic—and that they would not play too late. They promised there was nothing to worry about. The morals of the owners are lacking: they made promises and have done just the opposite.

94. David Fox was the meeting of the owners and neighbors in the alley in September. He introduced himself. He told the owners he was concerned about the impact of the venue on them, in response to which the owners told him that it would be acoustic music except for four times a year. To that, Mr. Fox said, “Great! Welcome to the neighborhood.”

95. Lee Roger Hollenbeck was not present for the en masse testimony and did not therefore take the oath or affirmation. But at the beginning of the hearing when

introductions were made, he stated that he was appearing in opposition to the renewal application.

96. Responding to Ms. Hollenbeck's testimony, one of her tenants, Amber Womack, has reported shaking of the unit from the noise. Asked whether she is aware that the other tenant in her unit, Christopher Womack signed the petition in support of renewal of the license, she said she was not aware of that.

97. Pat Tjaden said that the person who signed in favor of the renewal was her tenant, Carlos, who said he did not mind the noise.

8. Andrew Palmquist, called for rebuttal

98. Referring to Ex. O-1, Mr. Ritchie's readings, there are two measurements taken before they were open for business and had a sound system installed. He then identified four such readings: 7/13/20 (not open for business, no sound system installed), 9/27/20 (not open for business, no sound system installed), 9/30/20 (not open for business, no bands) and 10/1/20 (not open for business, no bands). There are a couple of instances when Mr. Ritchie took readings, but No. 38 had no bands playing on those dates, or No. 38 was not open. They were not open for business and had no performances on 11/4/20, 12/16/20, 3/30/21.

99. On July 13, 2020, there was no volley ball happening. The 9/27/20 and 9/30/20 dates is a time around which they were installing the sound system.

FINDINGS OF FACT

100. Notice of the public hearing in the form required by the Department was posted on the premises that are subject of the Application for 30 days prior to the date of the originally scheduled hearing, which was December 15, 2021. The hearing was continued to January 26, 2022 at 9:00 AM, and notice of the rescheduled hearing was posted on the premises for ten days prior to the rescheduled hearing. Palmquist, ¶ 17. It was also published in the Daily Journal on January 13, 2022.

1. The need and desires of the residents of the designated neighborhood do not support the issuance of the cabaret license

101. The evidence on need and desires of the residents presented at the hearing included petition signatures, affidavits and live testimony in support of the application.

102. **Petitions in support of the Application.** 30 adults signed petitions in support of the application, Ex. A-1, though two of those signers, Zach Rabun and Carlo Gonzales, also submitted affidavits.

103. LiquorPros on behalf of No. 38 contacted people in the designated area to collect signatures in support of the Application for renewal. The result of their contacts are set forth in Ex. A-1. They contacted 49 qualified individuals. 19 people refused to sign. We are not informed of where those individuals' businesses or residences were located.

104. 30 people signed in support of the renewal of the cabaret license. Of the 30 who supported renewal, 25 were business owners or managers. Only five were residents. It is notable that the five residents who signed in support all five lived on the same block as the opponents.

105. It is always hard to know what weight should be given to signatures on petitions. The character, enthusiasm, appearance or persuasiveness of the person carrying the petitions and requesting signatures can influence whether or not a resident of the neighborhood signs petitions in support of applications—regardless of how the signers actually feel about, or whether they even care about or know about, the subject application. Or it is possible that the schedules of the residents who signed in support did not put them at home at a time when they could be bothered by the music coming from No. 38. In this case, where there is ample testimony in the form of affidavits and live testimony, I give the petition signatures in support of the application less weight than the viva voce testimony of witnesses who testified in person.

106. **Affidavits in support of the Application.** The Applicant is required to produce at least one neighborhood witness in support of the application. *HP&P* § 9.5.1.1 In this time of Covid when hearings of the Department are held remotely, the hearing Policies and Procedures were changed to allow testimony of neighborhood witnesses to be presented “remotely through the use of a pre-filed affidavit, telephonic testimony, or virtual appearance facilitated by the Department.” *HP&P-Temp* §9.5.1.1.

107. The testimony from the affidavits is summarized in ¶ 14. All of the affiants are parties in interest, being either business owners or managers or residents of the designated area. *HP&P* §1.6.4.11. The Assistant City Attorney objected to receiving more than three affidavits as evidence. While *HP&P* § 9.5.1.1(ii)(b) limits an applicant to three neighborhood witnesses “to testify at length,” affidavits do not constitute testifying at length. The objection is overruled, and I have considered all of the neighborhood witnesses’ affidavits, Exs. A-3 through A-11, giving them such weight as I deem appropriate.

108. The Affidavits present a compelling view of the contribution that the cabaret license of No. 38 makes to the neighborhood. They present a view of the neighborhood that is consistent with the testimony of the opponents at the hearing: mainly, that RiNo is a burgeoning area of mixed uses, coming alive after 50 years when the primary former uses in the area were heavy industry, trucking operations, wholesale businesses and warehouses. Over the last 25 years, RiNo is developing a healthy and vibrant mix of residents and neighborhood businesses providing opportunities for casual and unexpected meetings, for enjoyment of food, drink, art and music.

109. The most persuasive statement supporting the renewal of No. 38’s cabaret license was that of Edith Anesi, a 39-year old business owner who states that the cabaret license is good for the neighborhood, that it is a great benefit to the surrounding community and that it will “drive more foot traffic to the businesses, the new park and the forthcoming promenade. It is family and dog friendly, providing drinks, food and live entertainment indoors and outside.” She says that “Local workforce and residents alike benefit to having a fun and responsible neighbor like the owner/operators of Number 38.” She says that “No. 38 provides “indoor/outdoor spaces, recreation, food and drink all while being

family/kid/dog friendly which is needed in this neighborhood. This neighborhood is not fully developed and we need establishments like No 38 to keep the vibrancy and development moving forward.” Ex. A-4.

110. The other affidavits each, in some way, resonate with what Edith Anesi said in hers.

111. The limitation on affidavits as evidence, however, is that the affiants are not subject to cross examination, and so the assertions don’t carry the weight that the same conclusions might have if they were subject to a searching cross examination about the witnesses’ bias, their proximity to No. 38, their lifestyle and habits, their way of experiencing what No. 38 is bringing to the neighborhood, and the extent to which the good that No. 38 brings to the designated area is duplicative of what other venues are providing.

112. Assertions in affidavits can be based on misinformation or too little information, circumstances that that can be corrected in cross examination so that the witness is given a chance to reconsider or reframe what they have stated. A good example of having too little information is the assertion of affiant John Deffenbaugh in his Affidavit, Ex. A-7, that “[t]he venue has operated successfully with negligible impact to surrounding neighbors.” The testimony of witnesses appearing at the hearing in person, all of whom were “surrounding neighbors,” shows that Mr. Deffenbaugh was unaware of what the neighbors in the same block as No. 38 had actually experienced since the venue opened.

113. I consider the affidavits offered here to be some evidence of support for granting the renewal Application. I give more weight to the affidavits than to the petition signatures, but less weight to the affidavits than to the live testimony of witnesses at the hearing. *HP&P* §1.6.4.7.

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

/

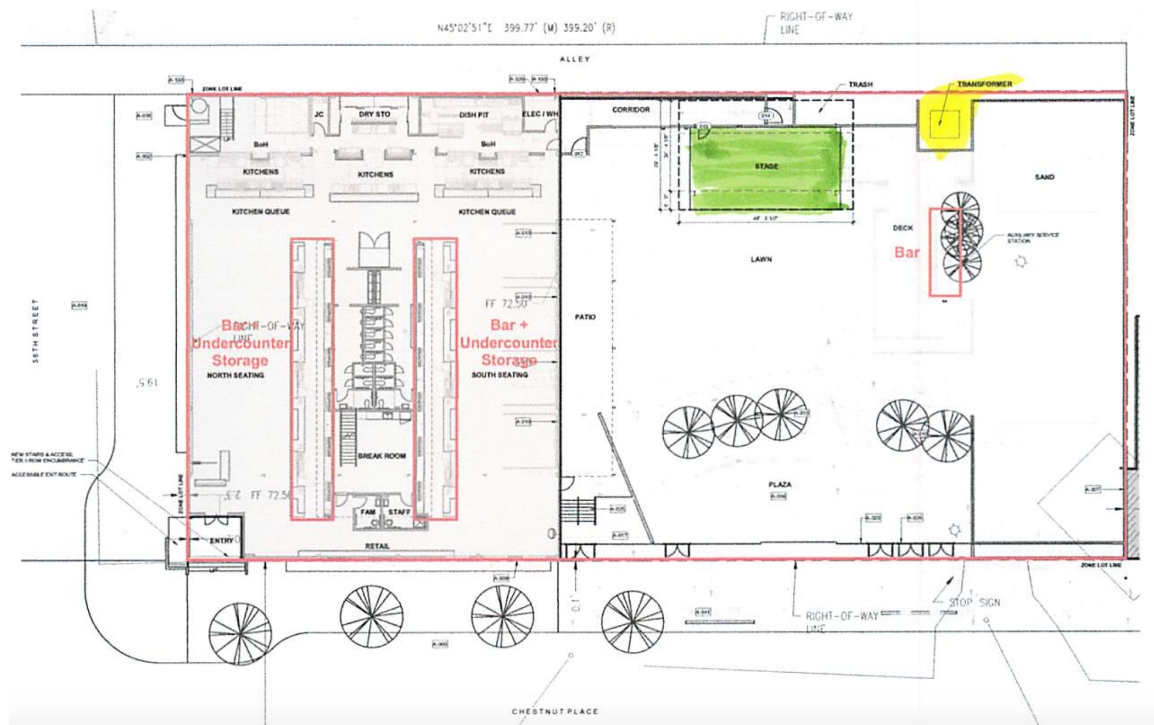
/

/

/

/

114. **Testimony of neighborhood witnesses.** The detail below from the first page of Ex. C-5 shows the close proximity of No. 38’s sound stage to adjoining residences. No. 38’s sound stage is highlighted in green below, and is 20 feet deep by 40 feet wide. Palmquist ¶ 28. Across the alley from where the sound stage and transformer (highlighted in yellow) are the closest five residential units to No. 38. The address of the residential units is 3527 Delgany, Units 1 through 5 and they are attached row homes with Unit 1 on Delgany Street and Unit 5 on the alley between Delgany and Chestnut. Jeremy Bryant’s Unit No. 5 abuts the alley and is the closest residence to the sound stage, being across the alley and only 18 feet from No. 38’s transformer. Palmquist ¶ 29. Sheila and Lee Hollenbeck own Unit 3 and Daniel Ritchie owns and lives in Unit 2. David Fox and Pat Tjaden’s property at 3515 Delgany is 50 feet from the Ritchie, Hollenbeck and Bryant row homes.



Detail from Ex. C-5, p. 1—floor plan of the premises

115. Mr. Palmquist said that the outside area where food and drink is served to an audience listening to live music is 115’ X 120’. What is striking about the proximity of adjacent properties is that people in the residences at 3527 Delgany (Ritchie, Hollenbeck and Bryant) and 3515 Delgany (Fox-Tjaden) are closer to the No. 38 sound stage than No. 38’s patrons who want to hear the music in the “Plaza” area of No. 38’s property.

116. Young people are generally more tolerant of sound than older people, and it is worth noting that two of the adjacent neighbors who oppose the license, Mssrs. Bryant and Ritchie in Units 2 and 5, are 34 and 40 years of age. They made a compelling case that the volume of sound coming from No. 38 is both “unbelievable” and unbearable.

117. No. 38 applied for a cabaret license in the summer of 2020. The unrebutted testimony is that No. 38’s owners made the following promises at the hearing: they would have music two times a week, the music would be finished at an early hour and the music

would be “primarily acoustic,” i.e., not amplified and not electronic. When No. 38 owner Spencer gave that assurance to Mr. Fox, Mr. Fox told him, “Great! Welcome to the neighborhood.” No. 38 owner and COO Mr. Palmquist did not deny in rebuttal that these promises were made.

118. The promises were immediately broken when No. 38 opened for business on October 9, 2020. Bands played on the outdoor stage virtually every day from Thursday through Sunday, and on weekends, the bands started as early as 1:00 o’clock in the afternoon.

119. No. 38’s owners Andrew Palmquist and Spencer Fronk were mostly unresponsive to the neighbors’ urgent requests to meet with them and to mitigate the unwanted noise coming from the outdoor sound stage. Palmquist and Fronk were able to ignore their neighbors’ requests with impunity, as during the Covid pandemic, the City of Denver shut down its processing of noise complaints and enforcement of the City’s noise ordinance. When Mr. Ritchie first tried to bring the excessive noise to the attention of the City by calling 3-1-1 in September 2020, a recording informed him that noise complaints were not being accepted.

120. There is a type of social contract that develops in practice in areas where there is a mix of uses. The mix is generally celebrated and valued by people who live, work and play in those areas. Reducing the friction that sometimes develops between competing uses depends on the good will and empathic relationship between people and uses sharing common space. Dimensions were given to the social contract that No. 38 had with its neighbors when it made promises at the original hearing and assurances to neighbors about having music two times a week, that music would be finished at an early hour, and that the music would be primarily acoustic.

121. After being unresponsive and doing nothing to mitigate sound complaints for six months, No. 38 did eventually agree to go to mediation requested by the neighbors. No agreement was reached, but thereafter the sound stage speakers used as monitors for the musicians were either removed or redirected, the masonry wall behind the sound stage was raised to match the height of the building, a subwoofer was either removed or changed out and a drum box was purchased. This has reduced the intrusion of sound into residences somewhat. But the starting point was a major disturbance on residential properties and now it has become only “less extreme.” The volume of music has gone from being shocking and “unbelievable” to being always audible, everywhere in the adjacent residential units with sound and thumping from No 38 intruding into the residences. Intimate moments between lovers are shattered by the sound and people living nearby cannot listen undisturbed to their own music, as the sound from No. 38 overwhelms the adjacent homes.

122. Weighing the affidavit testimony of supporters with the live testimony of witnesses at the hearing, I find that the need and desires of adult residents in the designated area, with only a few exceptions, is that the cabaret license not be renewed for No. 38.

2. The reasonable requirements are met by seven other cabaret licenses in the designated neighborhood

123. There are eight cabaret licenses, including that of No. 38, in the designated area. One or more of these venues play amplified music to the extent that the owners of No. 38 have blamed other venues for creating the noise of which the neighbors complain. The neighborhood witnesses identified some of these other sound sources: Kumas Corner (3500 Delgany), and River (3759 Chestnut) that have cabaret licenses, as well as Mockery Brewery, Ironton Distillery, and RiNo Art Park that do not have cabaret licenses. Other cabaret licenses on the east side of the river are Room for Milly and Blue Sparrow Coffee (3070 Blake), Safta Denver and the Source Hotel (3330 Brighton Blvd.) and Zeppelin Station (3501 Wazee).

124. I find that the reasonable requirements of the designated neighborhood are being met by the seven other cabaret licensees and that renewing No. 38's license is not needed to meet the requirements of the designated area.

3. Renewal of the the license will likely have a negative impact on the health, welfare and morals of the designated neighborhood

125. The evidence establishes that the residences that share the block with No 38 are awash with the amplified sound of No. 38 musicians four days a week for as many as nine hours a day during good weather. This has made it unlivable for these residents and their guests. The volume of sound originating at No. 38 deprives residents of the qualities they expect in their homes: the sense of comfort, privacy and security, free of unwanted and constant aural and visceral intrusions.

126. No. 38 has imposed a major disturbance on residential properties that has now become only "less extreme." The findings in ¶¶ 114-121 show that the constant and inescapable intrusion during good weather from Thursdays through Sundays puts everyone on edge whose aural space and sound space is dictated by the choices of DJs, sound board techs and the owners' programming at No. 38. The situation clearly presented is that the owners of No. 38 have decided what sounds and at what volume the residents nearby cannot live without, and cannot escape. It is unhealthy for the designated area to have residents subject to this bombardment.

127. I therefore find that the manner in which No. 38 has operated under cover of its cabaret license has had a negative impact on the health and welfare of the designated area, and that this negative impact will be prolonged if the license is renewed.

128. No. 38's owners made promises at the hearing on the original issuance of the cabaret license in the summer of 2022 that they broke immediately and without consequence: that No. 38 would have music two times a week, the music would be finished at an early hour. and the music would be "primarily acoustic." None of this was true. Furthermore, No. 38 discounted the pleas of neighborhood witnesses, dodged opportunities to engage on the matter and find a workable solution, and agreed to mediation only after six months of stonewalling. This shows a stunning disregard by Mr. Palmquist and Mr. Fronk of

their promises at the initial hearing and a disrespect for their neighbors over many months that is hard to fathom, given what is at stake for the owners of No. 38.

129. The Department of Public Health and Environment (“DPHE”) is tasked with enforcing the DRMC Chapter 36, the noise ordinance. It is unfortunate though understandable that the Department shuttered the program in 2020 so that its personnel and resources could be redeployed to address the urgency of the pandemic and to keep people safe. This left the Sysiphean task of attempting to achieve No. 38’s compliance with the noise ordinance to Mr. Ritchie and his neighbors.

130. This redeployment of resources at DPHE to the pandemic enabled No. 38 to disrespect the neighbors who share the block by not engaging with them to find a solution that would work for everyone. This is unfortunate, as respectful and serious engagement when there was time to experiment within the original term of the cabaret license might have led to a solution everyone could live with.

131. I find that No. 38 has negatively impacted the morals and moral fabric of the designated area, by flagrantly violating their promises at the hearing on the original license and by disrespecting the residents who live in close proximity to the venue. If the cabaret license is renewed, I find that it will likely continue to harm the morals and moral fabric of the neighborhood.

4. No. 38 is unlikely to operate lawfully if the cabaret license is renewed

132. No. 38 has operated under its current cabaret license for 15 months. During that time, it broke the promises made at the original license hearing and has failed to make firm commitments to its neighbors about changing its infrastructure so that it can operate within the 50 and 55 dB limits of DRMC Chapter 36. There was a full summer of good weather after the mediation when No. 38 could have engaged with the neighbors and experimented with changes that might have given their customers a satisfying listening experience while not overwhelming adjacent residents.

133. DPHE’s lead in the noise program, Paul Riedesel, found it striking at his first visit to No. 38 that adjacent residents were closer to the sound stage than people who would be in the intended audience for the music on No. 38’s licensed premises. Riedesel, ¶ 53. He did not think that outdoor concerts would be possible at that location without violating the noise ordinance. Riedesel, ¶ 51. And he stated that to No. 38 owner Spencer Fronk on November 16, 2020, and suggested that the music be played inside with the garage doors closed in order to be compliant. Riedesel, ¶¶ 54, 60. In a venue like this, patrons would expect sound levels from 90 to 100 dB in order to have a concert type, satisfying experience. Riedesel, ¶ 52.

134. During Mr. Riedesel’s visit to the site December 3, 2021, he worked with another DPHE sound investigator and a No. 38 employee to reduce the sound from a band at No 38 to a code compliant level, when measured from Mr. Bryant’s deck. But the level of sound thus achieved was “notably lower” than a concert goer would normally expect as a satisfying experience. Riedesel, ¶ 57. And there would be constant pressure from the bands

or from patrons to raise the volume of the music. And if past practice continues, the owners of No. 38 would continue to disregard the pleas of neighbors to engage.

135. I find that the character and reputation of the owners of No. 38 and the past record of operation of No. 38 does not warrant the confidence of the director that No. 38 will be lawfully operated within the requirements of DRMC Chapter 36. *See* DRMC §6-55(a)(3).

CONCLUSIONS AND RECOMMENDATION

136. **Posting and Notice.** The Applicant has satisfied the posting requirements in the DRMC and the *HP&P*.

137. The Findings of Fact show that the Applicant has not sustained its burden of proving by a preponderance of the evidence:

- a. That the residents and business owners and managers in the designated neighborhood desire the issuance of the dance cabaret license for the premises outlined in red on Ex. C-5;
- b. That the issuance of the license will be consistent with the reasonable requirements of the neighborhood;
- c. That the reasonable requirements of the neighborhood are not being met by the seven other cabaret licensees, or;
- d. That the Director of Excise & licenses is warranted in having confidence that the dance cabaret will be lawfully operated. On the contrary, if the cabaret license were renewed, it would be unlikely that the cabaret license would be lawfully operated within the 50 and 55 dB sound limits of DRMC Chapter 36.

138. Therefore, renewal of the license must be denied.

139. IT IS THEREFORE RECOMMENDED that the dance cabaret license previously issued to No. 38 Tenant, LLC d/b/a Number Thirty Eight at 3560 Chestnut Place, Denver, Colorado 80216 NOT be renewed.

RECOMMENDED this 6th day of February 2022.



Macon Cowles, Hearing Officer

Any party in interest or registered neighborhood organization may file Objections to this Recommended Decision within ten (10) business days from the date of this Recommended Decision. Responses to Objections may be filed within five (5) business days after receipt of

Objections. If the last day for filing falls on a weekend or holiday, Objections and Responses are due on the next business day.

All filings shall be made by email with a copy to each person or entity listed in the Certificate of Mailing below.

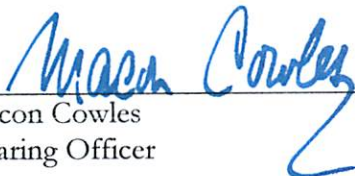
If a party in interest does not have access to email, objections shall be submitted in writing to the Director, Dept. of Excise and licenses, 201 W. Colfax Ave., Dept. 206, Denver, CO 80202.

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 certifies that one true copy of the foregoing Recommended Decision was sent via email, on the date above, to the following:

Molly Duplechian Interim Director, Denver Dept. of Excise and Licenses Molly.Duplechian@denvergov.org	Robert C. Runco, Esq. Attorney for Applicant RRunco@runprolaw.com
Emily Reisdorph, Esq. Assistant City Attorney emily.reisdorph@denvergov.org	Tom Downey, Esq. Ireland Stapleton Pryor & Pascoe, PC Attorney for Opponents tdowney@irelandstapleton.com
EXL Staff EXLRecordsManagement@denvergov.org CAOExciseandlicense@denvergov.org	



Macon Cowles
Hearing Officer