

**Department of
Alcoholic Beverage Control**

INITIAL STATEMENT OF REASONS

**PROPOSED ADOPTION OF REGULATIONS FOR FILING A PROTEST AGAINST THE
ISSUANCE OF AN ALCOHOLIC BEVERAGE LICENSE**

PROPOSED ADOPTIONS TO TITLE 4:

SECTIONS 146 – 146.4

PROBLEM STATEMENT AND PURPOSE

During the course of the application process for an alcohol license, applicants are required to post a notice of the intention to engage in the sale of alcoholic beverages at the intended premises. In addition, applicants must mail notices directly to certain individuals and organizations within specific distances to notify of their intention to operate a business with an alcoholic beverage license, and the Department of Alcoholic Beverage Control (ABC) notifies the public agencies and governing bodies with jurisdiction over the area with the proposed license premises. Within 30 days of these various notices, an individual, an organization, a public agency, or governing body may submit to ABC a protest to the issuance of the alcohol license and the proposed licensed premises.

There is confusion for ABC staff, the public, applicants, and protestants about how a protest must be verified as required by law to be accepted by ABC. In addition, the parameters that ABC may use to reject a protest are unclear. Promulgating regulations to create factors clarifying the statutory parameters for the rejection of protests will establish a uniform system and create a fair process for all who seek to protest the issuance of an alcohol license, as well as speed up the process for applicants to receive their licenses when they are found deserving to receive them. This proposed regulation will establish a uniform system of verification and give ABC specific factors and elements of a protest to analyze to determine if protests submitted are “false, vexatious, frivolous, invalid or unreasonable, or without reasonable or probable cause.”

BENEFITS

The proposed regulation should benefit both applicants and protestants by providing clear expectations for all sides of the process and ensure ABC only issues licenses that comply with the law, including preserving the quiet enjoyment of nearby residences, compliance with applicable laws by licensees, and reviewing all issues raised during a thorough investigation into each application as required by law.

This should both allow protestants better understanding and access to the protest process, while speeding up the processing time for applicants to obtain issued licenses at the end of the process if found to have met their burden and not be a danger to public health, safety, or welfare. The proposed regulations will

allow for a greater level of transparency in the protest rejection process, contributing to a fair and just process for applicants and protestants.

AUTHORITY

Authority: Sections 25750 and 24013 of the Business and Professions Code; and Section 22, Article XX, California Constitution.

Reference: Sections 23001, 23958, 23958.1, 23958.2, 23985, 23985.5, 23987, 24013, 24013.1, 24013.2, 24014, and 24015 of the Business and Professions Code.

NECESSITY

The specific purpose for each proposed section is as follows:

§ 146(a)

The proposed subsection establishes that that definitions that follow shall be used for interpretation of Title 4 California Code of Regulation Article 23, and Division 9 of the Business and Professions Code Chapter 6. This subsection is necessary to inform ABC staff, licensees, and the public how to interpret and understand the proposed regulations and the protest process.

§ 146(a)(1)

The proposed subparagraph establishes a definition for the term “applicant.” This subparagraph is necessary because it specifies that an applicant can be a person or entity applying for a license and will ensure understanding of the term by ABC staff, licensees, and the public.

§ 146(a)(2)

The proposed subparagraph establishes a definition for the term “department.” This subparagraph is necessary because it specifies that “department” refers to the California Department of Alcoholic Beverage Control and will ensure understanding of the term by ABC staff, licensees, and the public.

§ 146(a)(3)

The proposed subparagraph establishes the definition for the term “file.” This subparagraph is necessary because it specifies how an individual may file protests of an application with the department outside of an established formal hearing process.

§ 146(a)(4)

The proposed subparagraph establishes the definition for the term “governing body.” This subparagraph is necessary because it specifies what political entities qualify as a governing body under the proposed regulations and referenced statutes and will ensure understanding of the term by ABC staff, licensees, and the public.

§146(a)(5)

The proposed subparagraph establishes the definition for the term “organization.” This subparagraph is necessary because it specifies what entities qualify to file a protest with the department and will ensure understanding of the term by ABC staff, licensees, and the public.

§146(a)(6)

The proposed subparagraph establishes the definition for the term “protest.” This subparagraph is necessary to clarify that the act of submitting a statement of opposition to an application for the sale of alcohol is considered a protest and will ensure understanding of the term by ABC staff, licensees, and the public.

§146(a)(7)

The proposed subparagraph establishes the definition for the term “protestant.” This subparagraph is necessary to distinguish who is in opposition to an application from other parties involved in the application process and will ensure understanding of the term by ABC staff, licensees, and the public.

§146(a)(8)

The proposed subparagraph establishes the definition for the term “public agency.” This subparagraph is necessary to clarify what types of entities are considered public agencies in the protest process for an application and will ensure understanding of the term by ABC staff, licensees, and the public.

§146(a)(9)

The proposed subparagraph establishes the definition for the term “public official.” This subparagraph is necessary to clarify what individuals are considered public officials in the protest process for an application and will ensure understanding of the term by ABC staff, licensees, and the public.

§146.1(a)

The proposed subsection is necessary to establish who may file an individual or organizational protest for an application under investigation by ABC. This is necessary to clarify that employees of ABC or

designated representatives of a public agency may not submit protests as an individual unless they are doing so outside their official capacity. This subsection is also necessary to clarify that an individual or organizational protest under this section shall only be comprised of one person or entity.

§146.1(b)

The proposed subsection is necessary to explain the required grounds of a protest made by an individual or organization. This is necessary to inform ABC staff and the public what can be considered grounds for a protest and what criteria shall not be considered grounds for a protest of a potential licensed premises. This subsection is necessary to establish that protests must object to the application for the proposed premises based on the factors of public safety, welfare, health, peace, or morals.

§146.1(c)

The proposed subsection establishes the burden for verification of a protest upon the protestant, and the method for verification of a protest under statute. This subsection is necessary to address how a protest becomes “verified” under law as required by statute to be accepted by ABC. It is also necessary to ensure ABC staff and the public know what a verified protest is, and what the evidential burden is upon potential protestants of a proposed licensed premises under investigation by ABC.

§146.1(d)

The proposed subsection establishes a timeline for when a protest must be filed with ABC to be considered timely under statute. It provides an individual or organization with a 30-day period to make a protest from the date of either the public posting of notice on the proposed licensed premises, or a mailing sent to the individual or organization if required by statute due to their proximity to the proposed licensed premises, whichever date is later. This subsection is necessary to inform ABC staff, applicants, the public, and protestants the deadline for when a protest must be filed to be considered timely.

§146.1(d)(1)

The proposed subparagraph establishes that one of the triggers of the thirty-day period for a timely protest begins when notice is posted by the applicant on the proposed licensed premises as required by law. This subparagraph is necessary to inform individuals or organizations that are not required to receive additional person notice by mail of applicant’s intent to operate a business with an alcoholic beverage license in that location when they must file their protest to ABC to be considered timely.

§146.1(d)(2)

The proposed subparagraph establishes one of the triggers of the thirty-day period for a timely protest when notice is sent to nearby residences, schools, churches, and property owners in the areas

surrounding the proposed licensed premises. This subparagraph also places the burden for showing the mailing occurred and was sent to the correct location. This subparagraph is necessary to inform individuals or organizations that are required by law to receive notice pursuant to Business and professions Code section 23985.5 when they may file their protest and have it be timely under the proposed regulations. This subparagraph is necessary to provide a deadline to those the law specifically requires receive personal notice from the applicant which is different from other members of the public due to their proximity to the proposed licensed premises. This subparagraph is also necessary to establish that it is the applicant, and not ABC, which has the burden to show when the mailing occurred, and that it was sent to the correct location if there is a dispute about when the 30-day period begins.

§146.1(d)(2)(i)

The proposed subparagraph establishes that the 30-day period for timely filing a protest with ABC is separately calculated for each individual or organization that is required to receive notice pursuant to Business and professions Code section 23985.5. This subparagraph is necessary because applicants will sometimes miss certain individuals who are required by statute to receive a notice of the applicant's intention to operate a business with an alcoholic beverage license. This means that for each individual or organization the 30-day time period established in Title 4 California Code of Regulations section 146.1(d) will not begin until the applicant mails the required notice to that individual. If an individual or organization is sent notice, even after the posting period or other individuals' 30-day period for timely filing of a protest is over, they will still receive the full thirty-day time period to file a protest with ABC and have it found timely.

§146.1(e)

The proposed subsection establishes a burden upon ABC to accept a protest filed that is both verified and timely. The proposed subsection also establishes that ABC may inform a potential protestant of a defect in their protest that has been submitted but does not require ABC to do so. Finally, the proposed subsection establishes that the failure of a potential protestant to correctly verify a protest is not good cause for ABC accepting a subsequent untimely filing by the protestant. This proposed subsection is necessary to require ABC staff to accept and act upon protests that meet the standards laid out in the previous subsections. This subsection informs ABC staff, the public, licensees, and potential licensees how protests must be addressed by ABC staff when they comply with the requirements laid out in this section for individuals. This subsection is also necessary to inform potential protestants that they have the burden to ensure their protest is verified when filed. This subsection is necessary to allow ABC staff the ability to inform potential protestants of defects or errors in a timely filed protests to allow the protestant time to cure those defects or errors through a second filing so the protest will not be rejected, but the subsection does not require ABC to do so. This subsection is necessary to inform protestants that ABC staff will attempt to work with them, but failing to verify a protest is not considered good cause for ABC to accept a subsequent untimely filing of the protest.

§146.1(f)

The proposed subsection establishes a burden upon ABC to notify the applicant of all accepted protests by an individual or an organization during the investigation of the application. This subsection is necessary to ensure that an applicant is notified of all protested issues during the investigation and might be able to proactively address those issues raised by protestants prior to the final determination by ABC staff. This is necessary to better resolve issues early, streamline the application and hearing process, and ensure fairness to all parties involved.

§146.1(g)

The proposed subsection establishes the process for notifying a protestant that ABC recommends that the protested application be issued along with a deadline to ensure protestants are notified in a timely manner. This subsection is necessary to ensure all protestants are noticed in a timely manner of ABC recommending the issuance of a license to an applicant after investigating the issues raised in all accepted protests received pursuant to that application. This is necessary to provide protestants time to request a hearing in a timely manner and to not slow the application process for the applicant further.

§146.1(h)

The proposed subsection establishes that a protestant may request a hearing to determine if their accepted protest should bar the issuance of the license over ABC's recommendation. This subsection is necessary to ensure ABC staff, the public, licensees, applicants, and protestants understand how a hearing on a protest is created and to clarify the rights of protestants who want to request a hearing.

§146.1(h)(1)

The proposed subparagraph establishes a required timeline that an individual protestant must request a hearing in writing to ABC. The timeline created in this subsection begins upon the notice being sent to the protestant by ABC pursuant to section 146.1(g). This subparagraph is necessary to establish when the 15-day period for a protestant to request a hearing upon their accepted protest issues begins to notify ABC staff, the public, licensees, applicants, and protestants when the right of a protestant to request a hearing will expire.

§146.1(h)(2)

The proposed subparagraph requires ABC to set a hearing on the issues raised in an accepted protest for any protestant who timely requests a hearing pursuant to the previous subparagraph. This subparagraph is necessary to ensure that ABC sets a hearing if timely requested by a protestant with any valid protest issues accepted under this section.

§146.1(h)(3)

The proposed subparagraph requires ABC to accept an untimely hearing request by a protestant with an accepted protest if the protestant can show good cause. This subparagraph is necessary to ensure that if a protestant has issues meeting the required timeline to request a hearing upon a showing of good cause, ABC must set the hearing as if the request was timely made.

§146.1(h)(4)

This proposed subparagraph establishes that the issues to be determined and at issue during a hearing on a protest will be limited to the issues raised by an accepted protest and cannot be expanded at the time of the hearing. This subparagraph is necessary to maintain an orderly hearing process and ensure a timely process for applicants subject to a protest. This subparagraph also ensures that ABC staff, administrative law judges, protestants, applicants, and the public know what issues can be presented at a protest hearing.

§146.1(i)

The proposed subsection establishes that ABC may reject an otherwise accepted protest in its entirety or in part due to the factors listed in the following subparagraphs. This subsection is necessary to provide definitions and factors that are more specific than the vague statutory language of Business and Professions Code section 24013(b)(1) for rejecting a protest that is improper in some way. This subsection is necessary to ensure ABC staff, administrative law judges, protestants, applicants, and the public know how protests, or things raised within a protest, can be rejected by ABC prior to the hearing and ensure a streamlined protest hearing process.

§146.1(i)(1)

This proposed subparagraph establishes that an issue raised in an otherwise accepted protest that are outside ABC's jurisdiction within its licensing investigation, such as parking or transit outside the licensed premises, can be rejected by ABC since it is irrelevant to the issuance of the ABC license by ABC. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand that issues outside ABC's jurisdiction can be rejected as invalid protests to help streamline the protest hearing process since ABC cannot base its licensing decisions on these issues.

§146.1(i)(2)

The proposed subparagraph establishes that an issue that is raised generally and not specifically tied to the application being protested can be rejected by ABC in an otherwise accepted protest. This subparagraph is necessary because some protestants do not protest specifically to the application but to licensed premises in general. This is a form of frivolous or vexatious protests that are prohibited pursuant to statute. This subparagraph is necessary to ensure that ABC staff, the public, licensees,

applicants, and protestants understand that issues raised in a general way and not tied specifically to the applied for licensed premises can be rejected as invalid protests to help streamline the protest hearing process since ABC should not base its licensing decisions on issues that are not specific to the proposed licensed premises.

§146.1(i)(3)

The proposed subparagraph establishes that an issue that has no evidentiary backing, even if specifically attributed to the application being protested, can be rejected by ABC in an otherwise accepted protest. This subparagraph is necessary because accusations of harm that are attributed to a proposed licensed premises with no specific or probable evidence of the harm attributed to the proposed licensed premises can be raised by a protestant. This is a form of invalid or unreasonable protests that are prohibited pursuant to statute. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand that issues raised without any probable evidence for the harm specifically tied to the applied for licensed premises can be rejected as invalid protests to help streamline the protest hearing process since ABC should not base its licensing decisions on issues that are not backed by probable evidence for the harm created by the proposed licensed premises.

§146.1(i)(4)

The proposed subparagraph establishes that a protest issue brought by a protestant with a preceding antagonistic relationship with the applicant, unrelated to the application, can be rejected by ABC in an otherwise accepted protest. This subparagraph is necessary because protestants with preceding antagonistic relationships, unrelated to the application, are often biased and based on issues other than the application itself. This is a form of vexatious, frivolous, or unreasonable protests that are prohibited pursuant to statute. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand that a protest issue brought by a protestant with a preceding antagonistic relationship with the applicant, unrelated to the application, can be rejected as an invalid protest to help streamline the protest hearing process since ABC should not base its licensing decisions on complaints that are biased due to previous relationships between a protestant and an applicant.

§146.1(i)(5)

The proposed subparagraph establishes that a protest that is untimely filed may be rejected in whole or in part if the protest is either unverified by the protestant or untimely. If a protest untimely, it is prohibited from being accepted by statute. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand that a protest that is untimely will not be accepted by ABC.

§146.1(i)(6)

The proposed subparagraph establishes that a protest may be rejected in whole or in part if the protest is unverified by the protestant. If a protest is unverified, it is prohibited from being accepted by statute. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand that a protest that is unverified by the protestant will not be accepted by ABC.

§146.1(j)

The proposed subsection establishes that if a protest is rejected by ABC, in whole, and issues the license to the applicant, the protestant may file an accusation against the applicant within 10 days after the issuance of the license, and that this accusation must have the protest grounds as the alleged violation as the cause of revocation of the issued license. This subsection is necessary to allow a protestant who has had their protest rejected the ability to bring an accusation against the applicant/licensee over their protest grounds when the license issues in order to seek revocation if the licensee is harming the public contrary to ABC's determination and issuance. This ensures that any protest that was improperly rejected can still receive a hearing if the protestant wishes to continue forward after the license is issued. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand the hearing process for a rejected protest as a citizen accusation against the newly issued license.

§146.1(l)

The proposed subsection requires that ABC set a hearing to adjudicate an accusation made by a rejected protestant if filed within ten days from the date the license is issued. This subparagraph is necessary to ensure that ABC staff, the public, licensees, applicants, and protestants understand the hearing process for a rejected protest as a citizen accusation against the newly issued license and that the hearing is properly set by ABC.

§146.2(a)

The proposed subsection establishes the requirements for a protest made by a public agency or governing body. This type of protestant must file their protest within 30 days of ABC's notification of the application. This subsection is necessary to inform public agencies, governing bodies, ABC staff, the public, applicants, and protestants the proper time for a public agency or governing body to protest the issuance of an alcohol license application within their jurisdiction.

§146.2(b)

The proposed subsection establishes a burden upon ABC to notify the applicant of all accepted protests by public agencies or governmental bodies during the investigation of the application. This subsection is

necessary to ensure that an applicant is notified of all protested issues during the investigation and might be able to proactively address those issues raised by protestants prior to the final determination by ABC staff. This is necessary to better resolve issues early, streamline the application and hearing process, and ensure fairness to all parties involved.

§146.2(c)

The proposed subsection establishes that a public agency protesting an application may request up to an additional 20 days through a written request, they include a statement and reason for their need of an extension of time. The proper need is limited to being in the process of preparing a protest or proposing conditions with respect to the application. This subsection is necessary to inform public agencies, governing bodies, ABC staff, the public, applicants, and protestants the proper way to request additional time for a public agency or governing body to protest the issuance of an alcohol license application within their jurisdiction.

§146.2(d)

The proposed subsection establishes that if ABC recommends issuance of the license over the protest of a public agency or governing body, it shall inform the protestant, set a hearing on the accusation, and serve and notice of the hearing on the protest. This notice must be sent to the protestant within 5 business days of the recommendation to issue the license despite the protest. This subsection is necessary to inform public agencies, governing bodies, ABC staff, the public, applicants, and protestants the procedure if ABC recommends the issuance of a license even though the public agency, or governing body protested the issuance of a license to an applicant. This hearing is triggered from the time of ABC's recommendation and does not require the public agency or governing body to request a hearing as per statute.

§146.3(a)

This subsection establishes that in any hearing set by section 146.1(g)(2), any accepted protests that were notified who either did not respond and request a hearing, or responded requesting a hearing in an untimely manner, shall be deemed withdrawn as a matter of law. This subsection is necessary to ensure protestants who either do not request a hearing, or do so untimely, cannot prejudice against the applicant at a potential hearing brought by a different protestant and renew protest issues not to be determined at the hearing. This subsection is necessary to inform ABC staff, administrative law judges, protestants, applicants, and the public what happens to an accepted protest of a protestant that does not request a hearing, or one that does so untimely.

§146.3(b)

This subsection establishes that if no request for hearing is filed by any of the protestants who filed an accepted protest, all accepted protests will be deemed withdrawn under the previous subsection and

ABC may issue the license to the applicant without further proceedings. This subsection is necessary to inform ABC staff, administrative law judges, protestants, applicants, and the public about the procedure for an application where accepted protests exist but none of the protestants request a hearing on ABC's recommendation to issue the license to the applicant.

§146.3(c)

The subsection establishes that any protestant with an accepted protest that requests a hearing, but fails to appear at the scheduled hearing, will be deemed to have withdrawn their accepted protest, and ABC may issue a ruling granting the applicant their license without the need for further proceedings to occur. This subsection is necessary to inform ABC staff, administrative law judges, protestants, applicants, and the public about the procedure when a request for hearing was made by a protestant with an accepted protest but they fail to appear at the scheduled hearing.

§146.3(d)

The subsection establishes the ability for a public agency or governing body protestant to withdraw their protest at any time, and that upon such a withdrawal any hearing set to hear the issues contained in the protest levied by a public agency or governing body is also vacated. This subsection is necessary to inform ABC staff, administrative law judges, protestants, applicants, public agencies, governing bodies, and the public about the procedure if a protestant public agency or governing body withdraws their accepted protest and what occurs to a hearing set to adjudicate the issues raised in that protest.

§146.4(a)

The subsection establishes that an applicant may voluntarily withdraw their application due to any protest received, but if they make a withdrawal due to a protest, the applicant cannot file an application for a license at the address of the proposed licensed premises for a period of one year after the date of the withdrawal. This subsection is necessary to ensure an applicant has the right to withdraw their application in response to any protests received by ABC in response to their application, but also implements a one-year prohibition on a subsequent application at the same location by the same applicant. This prohibition is necessary to ensure that applicants do not repeatedly apply and withdraw to stop protesters from protesting their application for license due to repeated applications and withdrawals in a short period of time.

§146.4(b)

The subsection establishes that when an applicant withdraws their applications due to a protest under this section, any accepted protests by either individuals, or a public agency or governing body shall remain active against any subsequent applications by different applicants for the same location for a period of one-year after the date of the withdrawal. This subsection is necessary to ensure that any protest given to ABC in response to an application at a potential licensed premises that is withdrawn by

the applicant, will be renewed and apply to a subsequent application made within a year by a different applicant. This is necessary to ensure that protestants cannot be dissuaded by repeated applications by different applicants for the same location.

TECHNICAL, THEORETICAL, AND EMPIRICAL STUDY, REPORT, OR SIMILAR DOCUMENTS RELIED UPON.

Articles

There are no articles that pertain to these proposed regulations.

Department and Appeals Board Decisions

There are no Appeals Board decisions that affect these regulations.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

ABC has determined that these regulations have a negligible economic impact. Any cost associated with these regulations will be absorbed in ABC's current budget.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

ABC has determined that these regulations have a negligible economic impact. ABC anticipates no costs associated with implementing this proposed regulation on its budget, but if there are any unforeseen small costs associated with these regulations, they will be absorbed in ABC's current budget. The additional formal regulating of the protest process will create a more transparent and efficient process, but it will not create or eliminate any jobs at ABC as this is a process that is currently in practice. In addition, the additional formal regulating of the protest process will not create or eliminate any jobs in the alcoholic beverage industry. However, through the protest process, some applicants for alcoholic beverage licenses may be denied preventing some new jobs from being created. The further regulation of this process will not increase or decrease the number of alcoholic beverage licenses available, just create a more transparent process by which protests can be made, accepted, or rejected.

ALTERNATIVES CONSIDERED FOR THE FURTHER REGULATION OF THE PROTEST SUBMISSION PROCESS

There are no alternatives to the proposed regulations as they institute the policy and procedure for the protest process for license applications. ABC invites commenters to submit alternatives in their comments if they determine that ABC can institute these policies in a less restrictive but as effective manner, or in a more effective manner.

REGULATORY MANDATES

This regulatory package creates no new duties or regulatory mandates for licensees, local governments, or ABC.