

March 5th, 2021

Mary Hull Caballero, City Auditor

JoAnn Hardesty, Commissioner over Community and Civic Life

RE: Appeal for the Cafe Nell noise variance request NOISE VAR # 4642956

On February 25th, 2021, we were informed that the city would be granting a noise variance to allow Café Nell to operate mechanical equipment and add two speakers to a residential parking lot where the owner has constructed a 5,000sf outdoor restaurant illegally and without permits. We were told by the noise ordinance officer that he would wait to make a decision on the noise variance until the zoning complaint had been resolved. A complaint was filed in June of 2020, when the restaurant owner began construction in the residential parking lot next to my home.

The noise variance requested the use of a commercial grade heating unit that is typically used for construction sites and the ability to add two new speakers. I would like to appeal the city's approval of adding two additional speakers, which will be mounted on the restaurant building facing the residential parking lot and my home. When the restaurant is busy, the noise generated from the patrons is so loud, I can hear them inside my home with all windows and doors shut. Adding music only makes people talk louder. We have been explicitly told that voices cannot be regulated, so why add more noise that will just make people talk louder?

I just want to be clear, we are in support of this restaurant using their indoor dining when allowed, their street café and their tables on the sidewalk. The only issue we have is the illegal use of a residential lot as a restaurant. This noise variance is for use of machinery and additional speakers on the residentially zoned lot, before it is even deemed allowed.

In the background section on page 1 it states:

"The review must consider the physical characteristics; times & duration of the emitted sound; the geography, **zone** and **population density** of the affected area; whether the public health, safety or welfare is impacted." This is a residential neighborhood, in fact, it is on a greenway street. (See image at the end) The restaurant's conditional use permit doesn't allow for it to expand beyond its 49 seats, which it has recovered on the street and sidewalk. (See zoning image below) The noise variance is for speakers on a residential lot pointed at a single family home, which is not legally allowed to operate. This is not NW 23rd or NW21st, this is a residential neighborhood. Bordering the restaurant are two single family homes, a low income apartment building, a women's shelter, two more apartment buildings and a 5 unit condominium development. In other words the population of this residential neighborhood is dense, but this was not taken into consideration.

The noise complaint officer states in his findings on page 2:

"Neighbors of the Café Nell have taken it upon themselves to document sound levels radiating from the establishment. However, the approach utilized by the neighbors has come into questions. In recent years the Noise Control Office is seeing an increase in people in Portland using inaccurate phone based "noise meter" apps or other inappropriate tools to attempt to measure, quantify, and describe sound levels in the community." This sentence is meant to discredit those who are impacted by the noise generated by the restaurant. A phone app was not used and when the noise officer came out and met with the neighbor, they each measured the noise and got the same reading. It should not

be a surprise that the restaurant lowered the noise level when the noise officer was present. (See image below of equipment used.)

On page 4 it continues: "Although "benefit" can refer to many things, in regard to this case it refers to economic elements and **the cultural asset** of offering places to the Portland community to gather and enjoy eating out during the pandemic. Under the authority of the Noise Control Officer, he considered the benefits accorded to the public through the continued **existence of places in a pandemic to safely gather to enjoy a meal eating out.**" This is not a cultural asset, it serves rich, white customers like Mayor Ted Wheeler, that come from the suburbs in their fancy cars and illegally park without care of getting a ticket. The noise control officer acts as if Café Nell is the only restaurant offering outdoor dining. This is simply not true, there are hundreds if not thousands of restaurants following the rules and providing outdoor dining. Nearby comparable restaurants would be: Serratto's, Bar Mingo, Carina, North 45, Piazza Italia, Breakside, Via Delizia, the Matador, Lovejoy Bakers and St Honore just to name a few that are a short distance from Café Nell.

He continues on Page 4: "Therefore, the Noise Control Officer finds that a total denial of the requested variance will not benefit the greater public good." This establishment benefits those with privilege not the greater public good. This is not a neighborhood restaurant, this establishment is for the wealthy. (see menu image below)

On page 4 in the "approved, with the following conditions:
"This variance sound level at 59 dBA is less than what is allowed in a mixed use zone of the City with a Commercially Zoned mixed use property next to a Residential Land Use Zone." This statement is irrelevant as the restaurant and the parking lot are on residentially zoned lots. I have provided an image of the zoning at the end of this letter. The image was obtained using the directions provided on the city's website for how to check zoning. This statement was added by the noise officer to make it seem as if he was going above and beyond to make accommodations, when in fact he has made none. The limit not to exceed between two residential properties is 55, because the restaurant has a non conforming conditional use permit, they have to abide by 55, not 59 dBA.

		ZONE OF RECEIVER		
		Residential	Commercial	Industrial
<u>ZONE OF SOURCE</u>	Residential	55	60	65
	Commercial	60	70	70
	Industrial	65	70	75

D. Nonconforming use: The maximum permissible sound level that may be emitted from any lot containing a nonconforming use shall be the same as that permitted for the most restrictive zone in which the use would be conforming.

This is a clear case of nepotism. The city's website clearly states that you must check and see if your parking lot is zoned commercially and if it is not you cannot conduct business in a residential lot. When the pandemic started the city added directions for business owners to be able to determine if they can set up shop in their parking lot. On the City's website it states:

"Retail sales and services uses are only allowed in commercial/mixed use zones. They are limited in employment and industrial zones. **Check the zoning of the property before developing plans for outdoor seating and merchandise sales** (See [How do Businesses Check Zoning](#))"

Lastly, I have attached the public notice that was sent out to the neighbors. There is no mention of speakers being added. This was slipped in as a favor by the noise officer for the benefit of the restaurant. The neighbors were not notified that speakers were going to be added, yet another example of nepotism. Our neighborhood has a design overlay, if the restaurant wants to add speakers it must first go through the design review process and request public input.

This restaurant has seating on the street and sidewalk and now that we are open 25% inside their restaurant, in addition to the seating in the 5,000sf residential lot. This variance is not needed and does not benefit the neighborhood, it only benefits the privileged and the wealthy. I request that the two additional speakers are denied.

Renee Mercado
Residential Neighbor of Cafe Nell
930 NW 20th Avenue
Portland, OR 97209
503-341-6894

Image in front of my home showing this street as a neighborhood greenway street.



See next page for zoning image.

The light blue is the color for RM3 – Residential Multi-Dwelling

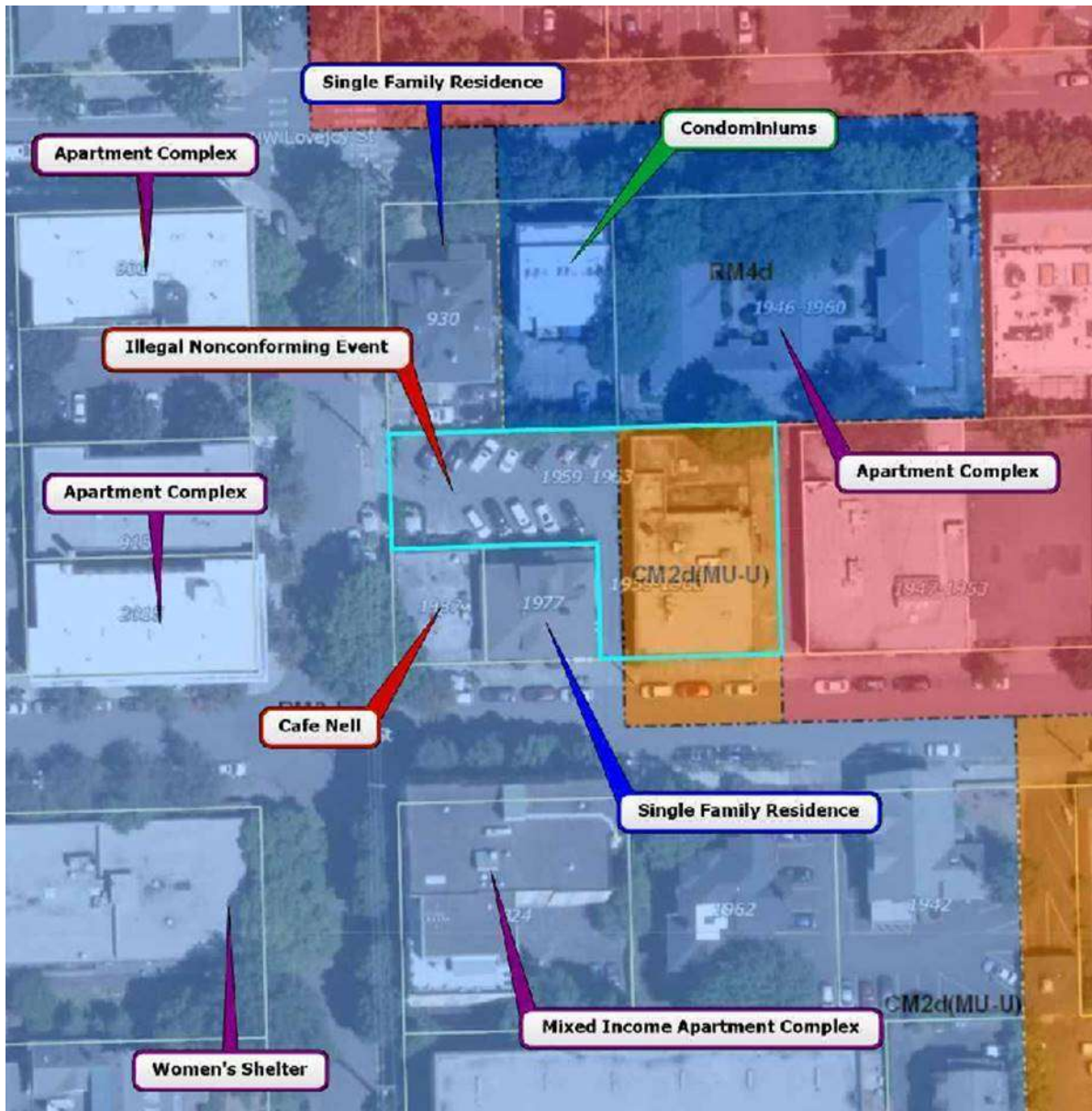



Image of noise meter below

Noise meter used by the neighbor, at the property line when the industrial equipment is turned up on high. Note it is not a cell phone as the noise officer wrongfully stated. This same meter was used when the noise officer came out and met with the neighbor and the readings matched.



See Café Nell's menu on the next page

Café Nells current menu does not serve the neighbors, it serves those with privilege.



Cafe Nell

@CafeNell · American Restaurant

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[cafenell.com](#)

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ENTREES

Risotto \$25.00	Grilled Pacific Salmon \$38.00
butternut squash, arborio rice, onion, garlic, sage, thyme, oregano ginger, kale pesto	wild caught columbia river king salmon filet, white bean root vegetable medley, kale pesto
<i>vegetarian</i> <i>gluten-free</i>	<i>gluten-free</i>
Oven Roasted Chicken \$25.00	Pork Shank \$36.00
koch farms free range a-line chicken breast, garlic mashed potatoes, sautéed baby spinach	red-wine braised lan rock farms pork shank "osso bucco" cut, sweet potato mash, crispy brussels sprouts, cider jus
Vegan Cassoulet \$26.00	Mussels & Fries \$26.00
mushrooms, navy beans, onion, sweet roasted garlic, delicate squash, roasted garlic, shaved yams	fresh penn cove mussels, white wine, crushed red peppers, heaped with hand cut fries, garlic aioli
<i>vegetarian</i> <i>gluten-free</i>	
Steak Frites \$32.00	Spicy Linguine & Clams with Chorizo \$28.00
grilled cascade natural teres major shoulder tenderloin bearnaise sauce, hand-cut fries	manila clams*, chorizo, vodka, garlic, shallots, kale, crushed red pepper, fresh parsley
<i>gluten-free</i>	

Illegal outdoor venue built in June of 2020 next to single family homes – currently seats 75, next phase “moderate” it will seat 150, final phase “low risk” it will seat 300.



See next page for building occupancy and legal seating that replaced what is lost due to covid

Café Nell seats 49

FORM W-206 (2-70)
 Date 6-30-76 CITY OF PORTLAND, OREGON BUREAU OF BUILDINGS Permit No. 500780

REPORT OF BUILDING INSPECTION

1987 N. W. Kearney Between 19-20 Aves
 Lot W 40' L 18 & L 17 Block 269n Couch's Addition
 Owner Gerald Menager Address 12275 N.W. cornell
 Contractor Onchi Const.* Address 8044 N. Senora Rd.
 Story, Type V, Group F2, F.D. 3 Zone A0 & A0B Cost \$40,000
 Plan Examiner VF Structural Engineer VZ 111-76

DATE	HOUR	REMARKS
		<u>1/2 Sec. 2928</u> New kitchen, mech./elec. (new) - new toilets, remodel intr. To convert sauna to restaurant. 4) Provide rangetop fire protection to satisfaction of Fire Marsh. to be posted & enforced. @ max. occ. ld. of <u>49 persons</u> , total. 7) Plbg. permit rq'd. (Use exist. sewer. on property w/ approval of Plbg. Div.).
<u>7-21-76</u>		<u>Checked - Now stripping out small</u> <u>portion being remodelled. Left correction</u> <u>card to obtain street use per. for box FVA</u>
<u>7-26-76</u>		<u>Street use obtained</u>
<u>8-13-76</u>	<u>11:45</u>	<u>Call - Card to cover FVA</u>

Legal Street Café – additional seating



Legal Sidewalk Café – additional seating



PUBLIC NOTIFICATION OF CITY NOISE PERMIT REQUEST

Dear Neighbors,

This is a notice from your neighbor, Café Nell, on the corner of NW 20th and Kearney.

We have applied to the City of Portland for a code variance request from the City Noise Code, Title 18. This is a temporary effort, until April of this year, to stay a part of your community and continue outdoor operations through the winter with additional heating equipment.

You have a legal right to offer public comment on our Code variance request and may offer input or complaints at any point to the City of Portland. If we do not meet the conditions of our variance decision, the City retains the right to revoke our temporary variation of the City Code. It is our goal to continue to be a good neighbor and to comply with all conditions set by the City's Noise Control Officer.

If you have any questions you can reach us at 503.295.6487, or via email: info@cafenell.com.

During our hours of operation, 9 am – 11 pm, please call 503.295.6487 for an immediate response to any of your concerns.

If you have questions for the City's Noise Office, you can call 503-823-7350.

If you have questions about the quasi-judicial code variance process, or if you have complaints you wish to share with the City, you can contact the City's Noise Control Office at noise@portlandoregon.gov.

Thank you for your patience with us during this very challenging time.

Your friends,

CAFE NELL
503.295.6487

1. Appeals to City Council. A variance decision of the Noise Control Officer or the Noise Review Board may be appealed to the City Council as follows:

1. Eligibility to appeal. A variance decision may be appealed by the applicant, his legal representative, any affected neighborhood association, or any person who has submitted oral or written testimony on the application.
2. Appeal acceptance criteria. Notice of intent to appeal shall be in writing to the City Auditor's Office within 10 days of the effective date of the decision. The notice shall identify the decision that is being appealed, and include the appellant's name, address, and signature, phone number, relationship to the variance decision action, and a clear statement of the specific reason(s) for the appeal including any alleged misapplication of City Codes.
3. Upon receipt of such appeal, the Auditor shall then place the matter upon the Calendar of the City Council.
4. At the time of the hearing, the City Council may consider such new matter as it deems appropriate, as well as the record developed before the Noise Control Officer or the Noise Review Board, and thereafter may affirm, reverse, modify or remand the decision



P O R T L A N D
CITY AUDITOR

Council Clerk
& Contracts

1221 SW 4th Avenue, Room 130
Portland, OR 97204
(503) 823-4082
<https://www.portland.gov/council-clerk>



April 16, 2021

Renee Mercado
930 NW 20th Avenue
Portland, OR 97209

RE: Appeal of Noise Variance / Permit

Café Nell - Application #4642956 (Updated Hearing Date)

Dear Renee:

This is to confirm the City Auditor's Office is in receipt of your appeal of the noise variance granted to Café Nell. A hearing has been re-scheduled before City Council on April 28 at 2:45 p.m. Under Portland City Code and state law, the City Council will hold this meeting electronically. All members of council will attend remotely by video and teleconference, and the City has made several avenues available for the public to listen to the audio broadcast of this meeting. The meeting is available to the public on the City's YouTube Channel, eGov PDX, www.portlandoregon.gov/video and Channel 30.

If you have any questions, please do not hesitate to contact me at 503-865-6262 or Deborah.Scroggin@portlandoregon.gov.

Sincerely,

Deborah Scroggin

Programs and Operations Supervisor



P O R T L A N D
CITY AUDITOR

Council Clerk
& Contracts

1221 SW 4th Avenue, Room 130
Portland, OR 97204
(503) 823-4082
<https://www.portland.gov/council-clerk>



April 7, 2021

Renee Mercado

930 NW 20th Avenue

Portland, OR 97209

RE: Appeal of Noise Variance / Permit

Café Nell - Application #4642956

Dear Renee:

This is to confirm the City Auditor's Office is in receipt of your appeal of the noise variance granted to Café Nell. A hearing has been scheduled before City Council on April 22 at 2:00 p.m. Under Portland City Code and state law, the City Council will hold this meeting electronically. All members of council will attend remotely by video and teleconference, and the City has made several avenues available for the public to listen to the audio broadcast of this meeting. The meeting is available to the public on the City's YouTube Channel, eGov PDX, www.portlandoregon.gov/video and Channel 30.

If you have any questions, please do not hesitate to contact me at 503-865-6262 or Deborah.Scroggin@portlandoregon.gov.

Sincerely,

Deborah Scroggin

Programs and Operations Supervisor



Jo Ann Hardesty, Commissioner
Suk Rhee, Director
1120 SW 5th Avenue, Suite 114
Portland, OR 97204
503-823-4519
portlandoregon.gov/civic/noise

TO: City Council
FROM: **Michael Montoya**, Strategy, Innovation & Performance Manager
Kareen Perkins, Livability Supervisor
Office of Community & Civic Life
RE: **Council Agenda Item:** Time Certain 2:45p.m. April 28, 2021
Cafe Nell at 1987 NW Kearny Street, Appeal of Noise Variance # 4642956

The memorandum provides an overview for the above-referenced Noise Appeal.

Vanessa Preston from Café Nell requested a noise variance on January 19, 2021 for outdoor heating and (2) fixed outdoor speakers (Attachment 1). The Noise Office granted Noise Variance 4642956 on February 24, 2021 (Attachment 1). Appellant, Renee Mercado, submitted the following appeal (Attachment 2) and this hearing ensued.

Appellant has raised concerns outside of Title 18. The Noise Office has no authority to make decisions on other City Codes (e.g., Title 33 Planning and Zoning, Title 31 Fire Regulations, Title 17 Public Improvements) and will limit its presentation to the applicable Title 18 criteria, as applicable to Noise Variance 4642956 and ask the appellant to do the same.

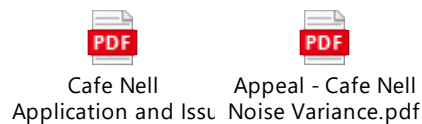
The Noise Office suggests the following procedure for the hearing:

Noise Control Officer report and summary	Paul Van Orden	10 minutes
Appellant addresses errors in application of Title 18	Renee Mercado	10 minutes
Variance holder Response	Vanessa Preston	5 minutes
Noise Control Officer Response	Paul Van Orden	5 minutes
Council Questions	Council	10 minutes

You may render your decision verbally at the hearing, or in writing following the hearing. Council has the authority to affirm (uphold), reverse, modify (uphold with conditions) or remand (dismiss) Noise Variance 4642956.

Thank you for helping to make our community input and processes work in the time allowed. Please let me know if you would like further information.

Attachment 1 Attachment 2



The City of Portland is committed to providing meaningful access. To request translation, interpretation, modifications, accommodations, or other auxiliary aids or services, contact 503-823-4000, Relay: 711.

503-823-4000: Traducción o interpretación | Chuyển Ngữ hoặc Phiên Dịch | 翻译或传译 | Письменный или устный перевод | Traducere sau Interpretare | Письмовий або усний переклад | 翻訳または通訳 | Turjumida ama Fasiraadda | ຫຼື ສາມາດຕິດຕໍ່ສອບຖາມ ຫຼື ສອບຖາມ ຫຼື ສອບຖາມ ຫຼື ສອບຖາມ | الترجمة التحريرية أو الشفهية