ISSUED AUGUST 15, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GAYLE C. CRENSHAW and WILLIAM E. CRENSHAW dba The Village Market 26000 Idyllwild Road Idyllwild, CA 92349, Appellants/Licensees, v. THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6580 File: 21-229266 Reg: 95033254 Administrative Law Judge at the Department Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: July 1, 1996 Irvine, CA

Gayle C. Crenshaw and William E. Crenshaw, doing business as The Village Market (appellants), appealed from a decision of the Department of Alcoholic Beverage Control[1] which denied their petition to remove a condition from their off-sale general license which prohibited the sale of distilled spirits (alcoholic beverages) in sizes of less than 750 ml., in accordance with the universal and generic public welfare and morals provisions of the California Constitution, Article XX, §22, and Business and Professions Code §§23800 and 23801.

[1]The decision of the department dated October 19, 1995, is set forth in the appendix.

Appearances on appeal included appellants Gayle C. Crenshaw and William E. Crenshaw, appearing through their counsel, Louis R. Mittelstadt; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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FACTS AND PROCEDURAL HISTORY

Appellants' present off-sale general license was issued in March 1994. Apparently appellants had been previously licensed at the same location with an off-sale beer and wine license since approximately 1988 or 1989 [R.T. 12]. There were no conditions on the prior off-sale beer and wine license [R.T. 14].

Thereafter, at some time near February 1992, appellants applied for the presently held off-sale general license. Protests were filed in opposition to the newly applied-for license [R.T. 15]. Inferentially, the present conditions dated February 25, 1992, were agreed upon by appellants and the department as a means of addressing the concerns of the protestants. The conditions became affixed to the license.

On February 9, 1995, appellants filed a petition with the department to remove condition 8.[2] The department denied appellants' request on June 26, 1995, and thereafter, appellants requested a hearing.

An administrative hearing was held on August 23, 1995, at which time oral and documentary evidence was received. At that hearing, it was shown that there were many changes in the Idyllwild area (a high tourist area in the Riverside mountains) since

[2]Condition 8 states: "No distilled spirits shall be sold in containers less than 750 ml. with the exception of cordials, which shall not be sold in containers of less than 375 ml."

the issuance of appellants' off-sale general license, including the construction of a two-story shopping mall containing 25 business establishments. There also had been a significant increase in the number of tourists and weekend travelers in the area surrounding the premises.

Subsequent to the hearing, the department issued its decision denying the requested removal of the condition. The department found that there was a chronic loitering problem in the area of the licensed premises, and removal of Condition 8 would enable transients and loiterers to more easily purchase small bottles of distilled spirits at lower prices. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raised the following issues: (1) the issue concerning a violation of the loitering condition raised at the administrative hearing was not a proper issue, (2) the original condition was not lawfully imposed, and (3) the denial of the modification request was not substantiated by the record.

DISCUSSION

I

Appellants contended that the issue concerning a violation of the loitering condition (condition 4) raised at the administrative hearing was not a proper issue.

The department denied the petition to remove condition 8 on the premise "that the grounds which caused the imposition of the condition(s) continue to exist" citing the substantive authority as the general public welfare and morals clauses of the California Constitution, and the procedural authority as found in Business and

Professions Code §§23800 and 23801.

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The department set the matter for hearing and sent notice of that hearing to all parties. Included in that notice was the required Statement of Issues which set forth the issues to be determined at the scheduled hearing.[3] The department cited the public welfare and morals provisions of the California Constitution and the procedural statutes. "In practice, the form of the statement of issues is substantially similar to the accusation." (California Administrative Hearing Practice, 1984 edition, §2.9, page 59).

Following a hearing on the matter, the department's decision stated that condition 4 was pertinent to the hearing. In finding XII which concerned condition 4, the decision states: "There is no evidence that the petitioners have taken any steps to redress the situation as required by condition number 4 of his license." In the same finding, in the second paragraph, it stated: "In light of the failure of the petitioners [appellants] to address the loitering problem despite the condition imposing a duty to monitor and to take appropriate action against unlawful loitering, it is plain that petitioners have demonstrated an overall indifference to the problem and the conditions upon which they agreed to the issuance of the Type 21 license."

Essentially, the department by its decision denied the request for the removal of condition 8 on issues of which appellants, according to the record, were not properly

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[3]Government Code §11504 states in pertinent part: "...The statement of issues shall be a written statement specifying the statutes and rules with which the respondent must show compliance by producing proof at the hearing, and in addition any particular matters which have come to the attention of the initiating party and which would authorize a denial of the agency action sought...."

notified. While the department properly received evidence of local persons [high school youths] congregating and riding their bikes in the general and immediate area of the premises [R.T. 30-31, 32, 35, 39-40], there was no substantial evidence concerning the impact such conduct may have on the sale of smaller bottles of distilled spirits, except for the very general and insubstantial testimony of police officer Glynn Johnson of the City of Banning [R.T. 44-45, 47, 48-51, 53].

In the appeals board's decision 99 CENTS ONLY STORES (1996) AB-6547, the board said: "But using the denial of an application for the transfer of a valid license cannot be the means of a de facto revocation or suspension of appellant's license." In the present matter, the department has used grounds which could cause an accusation to be filed, to deny a petition to remove a condition on a license. The findings, which focused on a possible congregation or loitering problem not sufficiently connected to the issue of the removal of the condition, were in error.

II

Appellants contended that the original condition was not lawfully imposed. The authority of the department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness is set forth in §23800(a). It states: "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the department may grant the license subject to those conditions.

Section 23801 provides that the conditions "...may cover any matter...which

will protect the public welfare and morals...."

We, therefore, view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"[4] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

Appellants signed the conditions on February 25, 1992. Business and Professions Code §23803 prescribes the only lawful manner for modifying or removing a condition on a license. In the present manner, appellants have conformed to that legally approved process and the matter is presently properly before the appeals board.

However, apparently appellants did not follow that process at any time after the imposition of the conditions, nor did they file a Notice of Appeal as to any alleged impropriety in the imposition of those conditions. The time to contest the imposition of the conditions has long passed, as provided in Business and Professions Code §23081. The appeals board is without jurisdiction to consider this contention.

The appeals board finds that the only time the board rejected a condition as unlawfully imposed (after the time allowed for appeal) was in the matter of Jajeh (1995) AB-6500, where the board reversed a decision concerning a condition which prohibited the transfer of the license, on the ground that the department may not proscribe its own constitutionally mandated powers of discretion. The department may not "abridge or enlarge its authority or exceed the powers given to it by the statute."

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[4]See Webster's Third New International Dictionary, 1986, page 1524.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Hallwell (1959) 169 Cal.App.2d 785 [338 P.2d 50, 54].)

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III

Appellants contended that the denial of the modification request (mainly on loitering grounds) was not substantiated by the record. Notwithstanding the arguments of appellants, the definition of "loitering" found in Webster's Third New International Dictionary, page 1331, suggests support for the testimony concerning the congregating or loitering of juveniles and other persons.

Leslie Pond, a department investigator, testified that on two occasions, he observed young people at around 3:00 p.m., possibly as late as 4:30 p.m., loitering by talking and riding bikes and skateboards in the parking lot and on one of the occasions, in front of the premises [R.T. 30-32, 39]. Glynn Johnson, a deputy sheriff for Riverside County, testified that while riding by the premises on patrol, she had seen loiterers made up of local citizens and some homeless people, in front of the premises [R.T. 43-44].

The record shows that the mountain area in which appellants' premises is located, is a high-people-count tourist area. Daily customers at the premises range from approximately 3,000 on non-summer weekends (Friday through Sunday) to 5,500 during the peak summer months. The premises is located in the downtown area [R.T. 14, 44]. Tour buses bring a flow of tourists to the area of the premises, from

two to three tour buses several times a week, with the premises selling over 200 sandwiches to tourists and backpackers who, apparently, desire to sit and loiter in front of the premises under a 50 to 100 year old tree [R.T. 16, 19]. It is common knowledge to all who enjoy the mountain resort areas of California, including the area presently under review, that the gathering of people in groups with attendant talking and conversing is a natural pasttime for all people, local and tourist. A search of the entire record finds no substantial evidence that would link the sales of smaller bottles of distilled spirits to the socially acceptable loitering of large groups of tourists and locals in this mountain resort area.

However, the foundational issue before the appeals board is the question of the change of conditions [the original grounds for imposition of the condition] as enumerated in the original Petition for Conditional License. The only ground mentioned in the petition is that, without the conditions, welfare and morals would be adversely affected. This statement is inadequate.

The case of Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 113], stated that the court had difficulty contemplating how something could be "per se" contrary to public welfare. The court said: "It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interests in safety, health, education, the economy, and the political process, to name but a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be

canvassed, considered and evaluated as being harmful or undesirable."

We cannot envision how appellants could ever show a change of circumstances based upon the wording of the petition which is "the" guide to the department in its mandated quest to be "satisfied"[5] that the circumstances which caused the imposition of the original conditions "no longer exist" in proceedings for modification.

CONCLUSION

There are no circumstances which the petition sets forth that define the conditions that caused the imposition, thus making attempts to conform to Business and Professions Code §23803, by appellants or the department, an impossibility. The decision of the department is reversed.[6]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]In the matter of Park (1995) AB-6495, the appeals board held that Business and Professions Code §23803 requires that the department must be "satisfied" as required by the statute, after investigation and due contemplated consideration.

[6]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.