

ISSUED JANUARY 13, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

YOUNG S. HYUN,	)	AB-6620
Appellant/Protestant,)	
	)	File: 20-302975
v.	)	Reg: 95033255
)	
VANCO TRADING, INC.,	)	Administrative Law Judge
dba Vanco Foods	)	at the Dept. Hearing:
10932 Westminister Avenue	)	Marguerite C. Geftakys
Garden Grove, CA 92643,)	
Respondent/Applicant, and	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	August 7, 1996
BEVERAGE CONTROL,	)	Los Angeles, CA
Respondent.)	
_____)	

Young S. Hyun (protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which overruled his protest and sustained the petition of Vanco Trading, Inc., doing business as Vanco Foods, for an off-sale beer and wine license, on certain conditions.

Appearances on appeal include applicant Vanco Trading, Inc., appearing through its counsel, Dale E. Washington; the Department of Alcoholic Beverage Control, appearing through its counsel, John P. McCarthy; and protestant Young S. Hyun, appearing through his counsel, Ralph Barat Saltsman.

¹The decision of the Department dated December 21, 1995, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant filed an application for the issuance of an off-sale beer and wine license. Applicant is a large full service super market within a building of 20,000 square feet, is open seven days per week, employs approximately 75 employees including two security guards, and caters to the general public with emphasis on the Vietnamese and Latino members of the larger community.

Apparently, the Department did not deny the application as no Statement of Issues was filed by the Department against the issuance. However, appellant filed a protest against the issuance of the license and an administrative hearing was held on August 17, 1995, at which time oral and documentary evidence was received. The Notice of Hearing On Protest was sent to all parties informing them of the date of the hearing and setting forth the issues to be determined, which issues were the universal and generic provisions of the California Constitution and Business and Professions Code §23958.² These provisions mainly gave foundation for the issues raised by protestant: undue concentration of licenses and high crime.³

Subsequent to the hearing, the Department issued its decision which determined that the license would be issued if applicant could show that the local governing board

²Further references to code sections will be to the Business and Professions Code unless otherwise indicated.

³The Administrative Law Judge (ALJ) properly formulated the issues for the hearing in finding III which were the issues raised by appellant in his protest. Since the protest was the statement of issues (Department's Instructions, Interpretations and Procedures manual, page L435), the Statement of Issues shown on the notice of the hearing was by necessity, generic in form.

determined that public convenience and necessity would be served by issuance of the applied-for license. As appellant's protest was effectively overruled, appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) applicant did not sustain its burden under rule 61.4, and (2) public convenience and necessity was not shown as required by rule 61.3.

DISCUSSION

I

Appellant contends that applicant did not sustain its burden under California Code of Regulations, Title IV, §61.4 (commonly referred to as rule 61.4).

The rule states in pertinent part that "No original issuance of a retail license...shall be approved for premises at which...The premises are located within 100 feet of a residence...." However, the rule has a saving clause: if "...the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents..." then the Department may issue the license.

The record shows that apparently the Department was satisfied that its responsibility to the nearby residents was accomplished by the conditions imposed on the license (exhibit 1). The preamble to the Petition for Conditional License (which lists the imposed conditions), refers to the rule 61.4 problem and essentially states that the imposition of the conditions would satisfy the rule.

We determine that notwithstanding the rule 61.4 issue raised by appellant in the present appeal, that issue was not raised by appellant in its protest as an issue and

therefore evidence under that issue would have been improper. Even though finding V mentions the rule, it is only in the context of explaining the conditions imposed. We conclude that the issue is not properly raised in this appeal.

II

Appellant contends that public convenience and necessity was not shown by applicant as required by rule 61.3.

The issues formulated by the ALJ for purposes of the administrative hearing were in accordance with the protest filed by appellant. Those issues were an undue concentration of licenses and high crime.

A map (exhibit 2) was admitted into evidence which shows the area within 1,000 feet of the premises. That area includes appellant's premises which is next to applicant's premises (appellant is licensed with a type 21 license which allows the sale of distilled spirits, beer, and wine).⁴ There is one other license similar to protestant's license, located approximately 400 feet from applicant's structure. There is a beer and wine license (type 20) located approximately 750 feet from applicant's structure.

Appellant argues that the California Code of Regulations, Title IV, §61.3 (rule 61.3) applies. The argument is incorrect. The rule (while discussed in the administrative hearing as applicable in the opinion of Robert Sierra, a Department investigator) was not proven applicable in that administrative hearing by substantial evidence--the testimony was hearsay only, notwithstanding the Department in its

⁴While protestant is a competitor to applicant, such relationship has no relevancy in this proceeding, other than protestant holds a license which is a factor in counting the number of licenses within a specified area.

internal review of the application considered the rule applicable [R.T. 10-12, 41-44]).

We therefore determine that rule 61.3 was not applicable and applicant was not obligated to show public convenience or necessity under that rule.⁵

Appellant also argues that applicant failed to prove public convenience or necessity. While the argument is mainly connected with rule 61.3, §23958 more properly touches upon this issue (see Finding IV), and in the view of giving broad latitude to appellant's position, we will review the issue of undue concentration of licenses within the context of §23958.

Section 23958 states that the Department "shall deny an application for a license if issuance of that license would...result in or add to an undue concentration of licenses..." The statute does not define the term "undue concentration of licenses" or how such undue concentration can be determined. However, in §23958.4, the term "undue concentration" is defined within the context of population or crime ratios (similar to, but not as all inclusive as, the ratios found in rule 61.3). Even if during the investigative process it was determined that there was an undue concentration of

⁵We note that the Petition for Conditional License in its preamble refers to rule 61.3. However, we decline to accept the preamble or the Petition's signing by applicant, as a foundation that the rule applied or was a foundation for the decision without substantial evidence being offered at the administrative hearing concerning its applicability.

We also note that the Department's Determination of Issues does not cite rule 61.3 as a foundation for its conclusion there was an undue concentration of licenses. But Finding IV does cite §23958 concerning undue concentration of licenses. It appears the ALJ used finding IV as the foundation for Determination of Issues 1.

licenses, §23958.4 allows for the issuance "if the local governing body of the area in which the premises are located determines that public convenience or necessity would be served by the issuance." We view §23958.4 as irrelevant in the present appeal considering the intended disposition of the present matter.

Finding IV is based upon hearsay population and crime statistics. No competent evidence sufficient to support the finding appears in the record [R.T. 10-12]; Finding IV therefore was not supported by substantial evidence. Since the finding was not supported by substantial evidence, Determination of Issues 1 whether public convenience and necessity was applicable, fails without such foundation.

Appellant's issue of high crime was not supported by substantial evidence of such crime in the area [R.T. 11-12]. The term "high crime" is a term of art used only in conjunction with the provisions of higher than the averages, as set forth in rule 61.3. Outside the rule, the term "high crime" has little meaning.

CONCLUSION

We conclude that Determination of Issues 1 and 2 were not supported by properly supported findings; Determination of Issues 4 and 5 were not supported by properly supported findings based upon the failed Determination of Issues 1 and 2; Determination of Issues 3 was supported by substantial evidence.

The decision of the Department is reversed and remanded to the Department for

such further proceedings as it may deem necessary in accordance with the views expressed in this decision.⁶

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

⁶This 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.