ISSUED JANUARY 28, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FAHIME MARTIN,	)	AB-6650
MANSOUR KHOSROABADI, and	)	
SOHAIL EFTEKHARZADEH	)	File: 41-270232
dba Dehkadeh Restaurant	)	Reg: 95031673
1722-26 North Tustin Avenue	)	
Orange, CA 92665,	)	Administrative Law Judge
Appellants/Licensees,	)	at the Dept. Hearing:
	)	Carolyn D. Magnuson
v.	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	November 6, 1996
Respondent.	)	Los Angeles, CA
_____	)	

Fahime Martin, Mansour Khosroabadi, and Sohail Eftekharzadeh, doing business as Dehkadeh Restaurant (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their petition to modify or remove three conditions on their on-sale beer and wine public eating place license which prohibited amplified music and dancing; restricted entertainment to a sole performer and a piano; and mandated that entertainment provided shall not be audible beyond the area under the control of the licensees.

[1]The decision of the Department, dated March 14, 1996, is set forth in the appendix.

Appearances on appeal include appellants Fahime Martin, Mansour Khosroabadi, and Sohail Eftekharzadeh, appearing through their counsel, Roger Jon Diamond; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued in September 1993, subject to a number of conditions which were imposed because the premises is located within 100 feet of residences and such conditions were deemed necessary to protect the quiet enjoyment of nearby residential property. Appellants filed a petition to modify conditions 6, 7, and 8 on July 11, 1994. The Department denied the petition on January 3, 1995, and appellants requested a hearing.

An administrative hearing was held on December 15, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that there had been no substantial change in the circumstances which existed at the time that the license was originally issued, and that the conditions imposed by the license were needed to protect the neighbors' quiet enjoyment of their property.

Subsequent to the hearing, the Department issued its decision which denied appellants' petition to modify or delete the conditions. Appellants filed a timely notice of appeal.

In their appeal, appellants raise the following contentions: (1) the imposition of the original conditions had no valid basis, arguing that the conditions were unrelated to the use and sales of alcoholic beverages and that entertainment and noise is a land use

problem under the jurisdiction of the City of Orange; and the Administrative Law Judge (ALJ) erred in not visiting the premises.

DISCUSSION

I

Appellants contend that the imposition of the original conditions had no valid basis, arguing that the conditions were unrelated to the use and sales of alcoholic beverages and that entertainment and noise is a land use problem under the jurisdiction of the City of Orange.

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800(a) is that "... if grounds exists 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 states that the conditions "... may cover any matter ...which will protect the public welfare and morals ... ." The original conditions were imposed by a document entitled "Petition For Conditional License" and dated August 16, 1993 [exhibit 1]. The preamble to the conditions sets forth the reason for the imposition in that the then proposed premises was located within 100 feet of residents and that California Code of Regulations, Title IV, §61.4 (rule 61.4) applied. The rule states that no retail license shall be issued if residences are located within 100 feet from the premises' location. However, if an applicant proves that the operation will not interfere

with the quiet enjoyment of the nearby residents, the license may be issued.

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,"[2] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

Section 23803 states that conditions may be removed if the Department is satisfied that the grounds which caused the imposition no longer exist. We interpret that to mean in the present matter that if appellants show that their operation now will not so interfere, the petition should be granted.

Appellants are mistaken in their views of the overall jurisdiction of the Department to regulate the sales and service of alcoholic beverages and those activities which are associated with the promotion and related activities regarding the entertainment of patrons. The statutes and rules of the Department clearly show that the Department is mandated to insure the public welfare and morals, which includes interior and exterior activities of a premises which may disrupt others, as defined by law.

The imposition of the original conditions in 1993 was not appealed and therefore that issue cannot be brought up at this time. The conditions are now part of the license and appellant may only seek to remove them as provided by section 23803 of the Business and Professions Code, which is the basis of this appeal.

The authority to regulate the sales and service of alcoholic beverages is exclusively

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

within the jurisdiction of the Department. Cities may regulate business establishments which sell alcoholic beverages, but may not so regulate in a manner which would impinge on the powers of the Department. A city may not regulate a licensed premises in a way that would diminish the control of the Department.

II

Appellants contend that the Administrative Law Judge (ALJ) erred in not visiting the premises. Appellants have cited no law to the Board that requires such a visit, nor is this Board aware of any statute or regulation which would require such a site visit. While such visit may be of assistance to a trier of fact, it is not mandatory. We fail to see how such visit would alter the outcome of the case, which involves only a legal question.

The problem is the nearby residences, and the logical connection between noise created within the premises which may disturb the residents. The record testimony of fights and other altercations within the premises (finding VI), and the noise which could create disturbances, all go to support the determination of the ALJ that appellants had failed to show (a change of circumstances) that the danger to quiet enjoyment no longer existed.

Since the Board is an appellate tribunal, it can only consider whether the Department committed error (which it did not), and whether the findings upon which the Department based its determinations are supported by substantial evidence in the record. The Board may not reverse a finding and the resulting decision simply because it may disagree with the Department.

CONCLUSION

The decision of the Department is affirmed.[3]

[3]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 of said statue.