ISSUED DECEMBER 5, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER 2715 El Oeste Hermosa Beach, CA 90254, Appellant/Protestant,	)	AB-6766 File: 47-313717 Reg: 96036719
v.	)	
CLUB SUSHI, INC. 1200 Hermosa Ave. Hermosa Beach, CA 90254, Respondent/Applicant,	)	Administrative Law Judge at the Dept. Hearing: John P. McCarthy
and	)	Date and Place of the Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	August 6, 1997 Los Angeles, CA

James Lissner (protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which refused to sustain his protest against the person-to-person and premises-to-premises transfer of an on-sale general public eating place license to Club Sushi, Inc. (applicant).

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant Club Sushi, Inc., appearing through its counsel, Alan

[1] The decision of the Department, dated October 17, 1996, is set forth in the appendix.

Dettlebach; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Applicant filed an application for a person-to-person and premises-to-premises transfer of an on-sale general eating place license. The Department recommended approval of the transfer, but several individuals filed protests against issuance of the license. An administrative hearing was held on September 5, 1996, at which time testimony and documentary evidence were presented. On October 17, 1996, the Department adopted the proposed decision of the Administrative Law Judge (ALJ) dismissing the protests. Protestant thereafter filed this appeal.

In his appeal, protestant contends that the ALJ erred: (1) in finding that no non-hearsay evidence was presented of undue concentration; (2) in failing to make a finding on the issue of public convenience or necessity; and (3) in finding that the conditions imposed on the proposed license served to meet the applicant's burden of proof under Rule 61.4. (Cal. Admin. Code, title 4, Ch. 1, §61.4.) The first two issues raised are interrelated and will be discussed together.

DISCUSSION

I

Protestant contends that the ALJ made errors of law in determining, first, that "no non-hearsay evidence was presented to show that the proposed premises is located in [an area of undue concentration as defined in §23958.4, subdivision (a)(2)]" and, second, that "Whether the proposed premises serves public convenience or necessity is . . . of no consequence." (Dept. Decision, Finding

VIII.) The ALJ also stated, in Determination of Issues II, that "The protestants did not carry their burden to show that issuance of the license would . . . add to an undue concentration of licenses as set forth in [Finding] VIII."

At the hearing, the Department investigator who conducted the application investigation testified that under §23958.4,[2] six on-sale licenses were allowed in the census tract in which the applicant is located [RT 15]. In fact, 22 licenses already existed in that area and the investigator testified that she had determined an undue concentration of licenses existed [RT 11]. None of the residents within 100 feet of the proposed premises had protested the application, and the Hermosa Beach Police Department did not oppose issuance [RT 17, 22-25]. The applicant

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[2]Business and Professions Code §23958 provides:

"Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

"The department further shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4."

Section 23958.4 defines “undue concentration” in terms of the ratio of reported crimes in the crime reporting district to the reported crimes in the local law enforcement agency’s jurisdiction [subd. (a)(1)] or, for on-sale licenses, a greater ratio of licenses to population in the census tract than the ratio of licenses to population in the county [subd. (a)(2)]. Subdivision (b) provides that a license may be issued in spite of undue concentration if the applicant shows that public convenience or necessity would be served by issuing the license or if the local governing body determines that public convenience or necessity would be served by issuing the license.

had agreed to the imposition of a number of conditions on the license, and the investigator determined that issuance of a conditional license would serve public convenience or necessity [RT 12-17].

Throughout the hearing, the testimony and the argument of counsel referred to the "over concentration" or “undue concentration” of licenses in the area as a fact [see, e.g., RT 11, 22-23, 56, 86, 191]. No party denied or argued against the statements made by the Department investigator that undue concentration existed, and no one raised an objection to the investigator’s testimony. No objection was made to the introduction into evidence of the Department’s exhibit 2, a copy of the Petition for Conditional License, or exhibit 3, a diagram of the area within a 1000' radius of the proposed premises.

We need not reach the question of whether evidence of undue concentration was hearsay, since we conclude that the ALJ erred in even requiring proof of "undue concentration." The existence of undue concentration was conceded by all the parties and should not have been considered as an issue in the matter.

The parties here did not argue about or try to prove whether undue concentration existed because that issue was not in controversy. Both the applicant and the Department clearly conceded the existence of undue concentration, in the testimony of the Department investigator, Joann Aguilar [RT 11, 22-23], and in the Department's Exhibit 2, the Petition for Conditional License, which was prepared by the Department and signed by the applicant. The fifth paragraph of the Petition states:

> "WHEREAS, the proposed premises are located in Census Tract 6210.02 where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business and Professions Code; . . ."

The Petition of the applicant, the testimony of the Department investigator, and the remarks of protestant's attorney [see, e.g., RT 56, 86, 191], together clearly indicated agreement among the parties that undue concentration existed and was not contested. Although not reduced to a formal stipulation, the specific concessions and the conduct of the parties make it clear that there was at least an implied stipulation as to the existence of undue concentration.

Often, this type of agreement of the parties is formalized by a stipulation, which is a type of judicial admission. A "judicial admission" is made during a trial or in the pleadings or briefs and is not treated as evidence. Rather, "It is a waiver of proof of a fact by conceding its truth, and it has the effect of removing the matter from the issues." (Italics in original.) (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §413, p. 511.)

Although there was no formal stipulation in this case to make this agreement binding on the ALJ, the implied stipulation of all the parties made it incumbent upon the ALJ to respect and abide by that agreement unless there was some compelling reason, such as the incapacity of a party or some other sort of unfairness, to disregard the agreement. Under these circumstances, there is absolutely no justification for a finding, after the hearing, that the parties should have litigated the issue and that, since they didn't, the judge was relieved of his duty to make a finding on the issue that the parties did actually litigate.

The ALJ based his Finding VIII and Determination II on his erroneous beliefs that the parties had to prove undue concentration and that the evidence presented was not competent to prove undue concentration.[3-] Since undue concentration was admitted, the ALJ erred in failing to make a finding on public convenience or necessity.

II

The protestant argues that the applicant did not carry its burden under Rule 61.4 of proving that operation of the premises would not interfere with the quiet enjoyment of the nearby residents and that it was error for the ALJ to find that the applicant's burden was met by the imposition of conditions imposed on the proposed license.

Rule 61.4 provides, in pertinent part:

"No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either of the following conditions exist:
"(a) The premises are located within 100 feet of a residence.
"(b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. . . .

* * *

"Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to-premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents."

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[3]Even if the ALJ was correct in concluding that the Department's evidence about undue concentration was hearsay, no objection to any of this evidence was made at the hearing. Therefore, even if the evidence was hearsay, it was still sufficient to support a finding on the issue of undue concentration. (See Kirby v. Alcoholic Beverage Control Appeals Board (1970) 8 Cal.App.3d 1009, 1020 [87 Cal.Rptr. 908], overruling, inter alia, Swegle v. State Board of Equalization (1954) 125 Cal.App.2d 432 [270 P.2d 518].)

The applicant's Petition for Conditional License stated that the premises were located within 100 feet of residences and issuance of the license without the conditions specified in the Petition would interfere with nearby residents' quiet enjoyment of their property. Eleven conditions were imposed on the license to address the problems of quiet enjoyment and undue concentration. The conditions cover such things as hours of alcoholic beverage service and restrictions on entertainment and noise.[4-]

The Department argues that it is actually the protestant who has failed to meet his burden of proof in this instance. Although the applicant does bear the initial burden of proving that the operation of the premises will not interfere with quiet enjoyment when it files an application for a license, the Department argues, applicant did meet that burden to the satisfaction of the Department, in part through the conditions that were imposed on the license. In this appeal, the protestant is the one who alleges that issuance of the license will interfere with quiet enjoyment and the protestant, therefore, bears the burden of producing evidence to prove that quiet enjoyment will be interfered with if the license is issued.

This burden, the Department argues, has not been met. While the protestant did present some evidence of problems in the area, there was no evidence establishing that the problems were or would be connected with the applicant's premises. The general evidence put forward by the protestant was rebutted by the

[4]Conditions addressing quiet enjoyment are 5, 6, and 8 (no video games, pool tables, or dancing); 7 (no noise heard beyond licensee's area of control); 9 (no live entertainment except karaoke); and 10 (karaoke only during certain hours).

Hermosa Beach Chief of Police who testified to and presented statistics of a decline in problems in the area and by a nearby resident who testified that the applicant's operations had not adversely affected him [RT 11-12; 92, 95].

The applicant argues that the conditions on the license and the evidence of the applicant's good record to date clearly justify the ALJ's finding that quiet enjoyment would not be interfered with.

We agree with the Department's analysis of who bears the burden of proof on this issue. In the course of the application process, the applicant met the burden imposed by Rule 61.4 to the satisfaction of the Department. It is the protestant who now raises the issue, and the protestant must produce evidence showing interference with quiet enjoyment. If, and only if, the protestant produced such evidence would the applicant need to produce evidence in rebuttal.

The evidence presented by the protestant had to do with the area in general, and not the applicant's premises particularly, except for the evidence about litter. The litter evidence was specifically considered by the ALJ along with the evidence of steps taken by the applicant's principals to prevent a recurrence of the problem. (Finding IX.)

The Department's acceptance of the conditional license is evidence of the Department's belief that, with those conditions, there would not be interference with residents' quiet enjoyment of their property. The protestant did not really address the effect of the conditions, but seemed to treat the issue as if there would be no restrictions on the applicant's activities after the license issued.

As long as the applicant complies with the conditions, it is reasonable to assume, as the Department did, that the premises will not interfere with the nearby residents. This Board will not disturb the Department's reasonable determination on this matter.

Appellant and his fellow protestants are clearly, and not unreasonably, concerned about potential problems in their city that might be affected by issuance of alcoholic beverage licenses, primarily near the beach. Their concerns, however, appear to be more appropriately addressed to the city departments and commissions that deal with zoning, parking, and planning. The Department has great discretion, but only within the scope of its jurisdiction.

CONCLUSION

The decision of the Department is reversed as to those portions of Finding VIII and Determination of Issues II that deal with undue concentration and public convenience or necessity and remanded for the purpose of making a finding on the issue of public convenience or necessity. In all other respects, the decision is affirmed.[5-]

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

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[5]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.