ISSUED DECEMBER 12, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD-

OF THE STATE OF CALIFORNIA

CHARLES H. LAWRENCE and MICHAEL E. O'LEARY, dba The Shack Bar & Grill 6941 La Jolla Boulevard La Jolla, CA 92037, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6819 File: 47-306666 Reg: 96037974 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing:- October 1, 1997 Los Angeles, CA

Charles H. Lawrence and Michael E. O'Leary, doing business as The Shack Bar & Grill (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their petition to modify a condition on their license to permit the installation of two pool tables, because the granting of the petition would render the continuance thereof contrary to the public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §§23800-23801, in that the grounds for the imposition of the condition continue to exist.

[1] The decision of the Department dated February 6, 1997, is set forth in the appendix.

Appearances on appeal include appellants Charles H. Lawrence and Michael E. O'Leary, appearing through their counsel, Judi M. Sanzo, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued in July 1995, subject to a number of conditions,[2] including the following:

"1. No live entertainment or dancing shall be permitted on the premises.-

2.- There shall be no pool tables, billiard tables, football games, pinball games or- any other amusement devices, coin operated or otherwise, maintained upon the premises at any time."

Appellant filed an application to modify condition 1 to permit up to three unamplified musicians, and to remove condition 2. Upon being advised by a Department investigator of concerns expressed by neighbors, petitioners filed an amended petition, abandoning their request to modify condition 1.

Following an administrative hearing on January 9, 1997, on their amended

[2] The petition for issuance of the conditional license recites that the premises and/or parking lot are located within 100 feet of six residences, and that, without the conditions, issuance of an unrestricted license would be contrary to the public welfare and morals, in that it would interfere with the quiet enjoyment of the property of nearby residents, and constitute grounds for denial under the provisions of Rule 61.4 (Cal.Code Regs., Title 4, div.1, §61.4). Rule 61.4 essentially states that the Department shall not issue a license if there are residents within 100 feet of the premises, reflecting an implied presumption that a retail alcoholic beverage operation has the potential of disturbing residential quiet enjoyment.

petition, the Department denied the petition on the grounds that appellants had failed to satisfy their burden of proof, citing noise complaints from nearby residents and the absence of any hour restrictions on the present conditions on the license.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants claim that new evidence exists, consisting of the withdrawal of noise complaints by two of the neighbors who testified in opposition to the petition at the hearing, which, appellants assert, could not have been produced in the exercise of reasonable diligence.

DISCUSSION

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 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 states that the conditions "...may cover any matter...which will protect the public welfare and morals...." Section 23803 provides that the Department, upon the petition of a licensee, shall order the removal of such conditions if it is satisfied that the grounds which caused the imposition of the conditions no longer exist.

As noted, the Department denied the petition on the grounds that appellants had failed to satisfy their burden of proof, citing noise complaints from nearby residents and the absence of any hour restrictions on the present conditions on the license.

Two neighbors, Teresa Costello and Charles Crossin testified concerning numerous instances where they were bothered by excessive late night and early morning noise generated by appellants' patrons. Their testimony is fairly summarized in the proposed decision of the Administrative Law Judge (ALJ), as well as having been set forth at length in appellants' opening brief to this Board. Subsequent to the hearing, these two witnesses each furnished letters to appellants stating they wished to withdraw their oposition to the requested change in conditions. Appellants have characterized this change of heart as new evidence which was unavailable at the time of the hearing, and seek a remand so that they may be considered.

According to the testimony of James Sabins, the Department investigator who conducted the investigation in response to appellants' petition, the conditions were adopted from a prior license issued for the premises. According to investigator Sabins, there were three residences within 100 feet of the premises, one of them a single family residence 20 feet from the premises,[3] and the other two consisting of apartments above an upholstery and furniture company behind the aforementioned residence. He acknowledged that the residents he contacted in the course of his investigation voiced less objection to the addition of pool tables than they did to the proposed and later withdrawn request for permission to add live musicians.

[3] The ALJ received into evidence as administrative hearsay a letter written by the current (one year) occupant of this residence, disclaiming any objection to the addition of the pool tables.

A major concern of Sabins was the hours of operation permitted by the license. Under the license, the premises are permitted to operate until 2:00 a.m. seven days a week. He pointed out that in recent years the standard position of the Department in Rule 61.4 situations is to restrict sales and consumption of alcoholic beverages to 11:00 p.m. Sundays through Thursdays, and midnight on weekends [RT 60], to reduce late night noise levels.

The claimed discovery of newly discovered evidence as a reason for a new trial, which, essentially, is what appellants seek, is generally looked upon with disfavor, and a strong showing of the essential requirements must be made (see 8 Witkin, California Procedure, Attack on Judgment in Trial Court, §32, page 537). Similarly, if the supposed new evidence is not likely to bring about a different result, it is immaterial and does not justify a new trial. (See Witkin, supra, §33 at page 539, and cases cited therein.)

Appellants have offered evidence that two of the nearby residents now have misgivings about their testimony, and contend their opposition was based primarily upon the proposed addition of live music. The evidence indicates that there are still residences within 100 feet of the premises, albeit three rather than six. The record does not indicate the views of the occupants of these residences.

In the hearing before this Board, it seemed apparent that the focus of attention at the administrative hearing was upon noise problems which might result from the addition of live musicians, and less upon any impact the addition of the pool tables may have upon the neighborhood. The denial of the petition by the Department and the

opposition of the San Diego Police Department appears to have been based upon objections of nearby residents, so if nearby residents no longer object, the Department and the police may no longer opppose the petition. Although the "new" evidence offered by appellants is less than overwhelming, we do think that, in light of the shifting of positions with regard to the scope of the request for modification, and possible misplacement of emphasis of the testimony of the witnesses who testified, a remand would be justified in the somewhat unique circumstances of this case.

CONCLUSION

Pursuant to Business and Professions Code §23085, this case is remanded to the Department for reconsideration in light of the proposed change of testimony on the part of Teresa Costello and Charles Crossin.[4-]

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

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[4] This final decision 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 district 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.-