ISSUED JUNE 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KIM J. EUN dba Town Market & Video 526 Main Street Huntington Beach, CA 92648, Appellant/Applicant, v. RON BACKLUND, et al. Respondents/Protestants, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6890 File: 21-320066 Reg: 97038628 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: April 1, 1998 Los Angeles, CA

Kim J. Eun, doing business as Town Market & Video (applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied her petition for a person-to-person and premises-to-premises transfer of an off-sale general license, as residents are located within 100 feet of the proposed premises, whereby issuance of the license would be contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, pursuant to the applicability of California Code of Regulations, title IV, §61.4 (rule 61.4).

[1]The decision of the Department, dated May 22, 1997, is set forth in the appendix.

Appearances on appeal include applicant Kim J. Eun, appearing through her counsel, Ralph Barat Saltsman and Stephen W. Solomon; the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein; and protestants Ron Backlund, Jo Christian-Craig, Darcy Musler, Loretta Wolfe, and Wayne Wolfe.

FACTS AND PROCEDURAL HISTORY

Applicant had negotiated the transfer of an off-sale general license from a location in the city of Santa Ana.

The certified records of the Department show that on May 6, 1996, the owner of the license to be transferred to applicant recorded a Notice of Intended Transfer of Liquor License or Licenses to applicant at her Huntington Beach location. Applicant filed an application for a license dated May 16, 1996, which shows the applicable transfer fees as well as notations of person-to-person and premises-to-premises transfers.

On January 2, 1997, the Department rejected the application with a Statement of Issues listing nine residences within 100 feet of the premises and stating that normal operation of the premises would interfere with those nine residences. The Statement also listed 30 residences located from 105 feet to 475 feet from the premises (the Statement redundantly relisted five of the nine within-100-feet residences in the listing of the 30 residences).

An administrative hearing was held on March 6, 1997, at which time oral and documentary evidence was received. The administrative law judge thereafter filed his proposed decision which was adopted by the Department.

The Department determined rule 61.4 applied, as there were residences within 100 feet of the proposed premises. Those nearby residents were disturbed by the previous licensed owner's operation (Finding XIII and XIV). Finding IX states that applicant had rejected condition 2 which concerned the sales of single containers of alcoholic beverages.

Applicant thereafter filed a timely notice of appeal. In her appeal, applicant raises the following issues: (1) rule 61.4's applicability was not properly established, arguing that there was no substantial evidence that the licensing was an original or premises-to-premises transfer, and that the distance requirements required by the rule were not properly applied; and (2) the Department improperly failed to prepare conditions which could negate the impact of the rule.[2]

DISCUSSION

I

Applicant contends rule 61.4's applicability was not properly established, arguing that there was no substantial evidence that the licensing was an original or premises-to-premises transfer, and that the distance requirements required by the rule were not properly adhered to.

A. Whether the application for license was of the kind which is encompassed by the rule.

Rule 61.4, concerning this argument, states:

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[2]Applicant's opening brief made "passing mention" of the 90-day provision in rule 61.4, which provision could negate the applicability of the rule. Thereafter, in applicant's closing brief, the 90-day issue was vigorously pursued. The Appeals Board accepts the issue as validly raised, as there is no showing of prejudice to the Department, as the Department's brief argues this issue, also.

> "No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which the following conditions exist ...."

For the rule to be applicable, the license sought must be an original issuance, which is not the case in the present appeal, or a premises-to-premises transfer of a license to a new location.

The record shows that an application was filed by applicant on May 16, 1996. The application shows the transferor of the license was a corporation and applicant paid fees for a premises-to-premises transfer of that license.

We determine that the record shows the application was for a premise-to-premises transfer, and therefore, the type of license encompassed by the rule.

B. Whether the distance requirements required by the rule were properly applied.

Rule 61.4, concerning this argument, states:

"Distances provided for in this rule shall be by airline [measurement] ...."

Applicant argues that the Department investigator who calculated the distances to determine if the rule applied, used a Roll-A-Tape to calculate the distances, and, at an administrative hearing, testified that he could not walk a straight line in the use of the tape apparently due to residences' property walls. Therefore, applicant argues, the investigator made approximate measurements only [RT 17-18].

The Appeals Board in the case of Cervin & Siqueiros (1997) AB-6783, discussed in depth the use of a Roll-A-Tape in close cases where inches could determine the applicability of rule 61.4. The applicability of the rule is usually

crucial as it shifts the burden of proof to an applicant to prove that the applicant's operation will not interfere with nearby residents. Without the rule, the burden is on the Department to prove the operation will so interfere.

In the present appeal, the estimates and the use of the tape are of little consequence. There are four apartments over the premises. Photographs in Exhibits A-7, A-8, and A-9 show the typical local market type building, with the four apartments directly overhead. While technically true that estimates and tapes are improper in "close calls," it is obvious in viewing the photos, that the apartments are within 100 feet of the premises, and therefore, the rule applies.

II

Applicant contends the Department improperly failed to prepare conditions which could negate the impact of the rule.

Exhibit 3 is a Petition for Conditional License which lists 10 conditions which if signed, and the license issued, would be imposed on that license. The conditions were not accepted by appellant.

Chong H. Eun, husband of applicant, testified that all the conditions proposed by the Department were acceptable except 1 and 2 [RT 145].

Gerald Verde Diza, the Department investigator handling the application investigation, testified that applicant was concerned with condition 1 (hours of operation) and condition 2 (prohibition against selling single containers of alcoholic beverages except in manufacturer's prepackaged multi-unit containers) [RT 36, 40].

Considering the litter and noise testified to by the protestants, and the close

proximity of the proposed licensed premises to the residences, the single container restriction and the hours of operation would be a reasonable restriction on the new license.

Unfortunately, the investigator testified that he intended to recommend denial even if applicant signed the conditions [RT 40-41], and the purpose of the conditions in the investigator's mind, was to get the protestants to withdraw [RT 42]. While the investigator's reasons for obtaining the conditions were improper and less than professional, this could be rectified on appeal if such reasons and any actions of the investigator were found to be prejudicial to applicant. But applicant refused to consent to the conditions. Thus, any problem with the investigator's views was irrelevant.

III

As explained in footnote 2, applicant contends she was prohibited from filing an application for the transfer of the license within the specified time limit of the 90-day provision of the rule, due to a backlog of application matters at the Santa Ana office of the Department.

Rule 61.4 in pertinent part, states:

"This rule does not apply where the premises have been licensed and operated with the same type license within 90 days of the application."

Both the previous license and the proposed transferred license were of the same type [Finding IV].

The record shows that the previous license was transferred from the

premises on January 31, 1996 [RT 27]. Applicant filed an application for the transfer on May 16, 1996, a period of 15 days beyond the time specified for the rule not to apply. The transferor of the license file a Notice of Intended Transfer of Liquor License or Licenses with the Orange County Recorder's office on May 6, 1996. The transferor signed a Department document entitled License Action Request, being an application to transfer the license, but the document is not dated or time stamped.

The record also shows that applicant signed and filed three documents with the Department, all dated March 13, 1996: Diagram of Licensed Premises, Planned Operation, and Supplemental Diagram. While the documents show no date as to when the Department received them, there is on the first and last document listed, under the caption "For Department Use Only," a signature and the date of May 25, 1996.

The contention of applicant is that the Department's local office was not able to schedule an appointment with her for the filing of the application until after the expiration of the time requirement of the 90-day provision. However, the record does not support this contention.

The Department investigator testified as follows:

"Q: During that period of time, in early 1996,[3] do you recall how long it was taking to get an appointment by an applicant to file an application?

A: Maybe a month or two. No, I can't really say I do.

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[3]The questioning just prior to the testimony, concerned a first application filed in late December of the preceding year, but withdrawn in February of 1996.

Q: But a month wait in order to file an application is not uncommon in the Santa Ana district office, is it?

A: No." [RT 33-34.]

Applicant's husband testified that there were three applications filed during the period from December 1995 to May 16, 1996. The first two had been withdrawn. A broker had been hired to file the second application [RT 139-143]. The third application is the focal point of the present appeal. Following Mr. Eun's testimony concerning the first and second application, he testified:

"Q: All right. Afterwards, did you then get another license?

A: Yes.

Q: And it took you until approximately May 16th to get an application to file the third time?

A: I think before May, I file that April 1996. We just negotiated through them.

Q: You negotiated in April, but it took to May 16th to get the appointment?

A: Yes.

O: And that's the application we're here for today.

A: Yes." [RT 143-144.]

The contention of applicant is based on innuendos and assumptions, that the Department by some office-generated delay, would not allow applicant to perfect her time under the 90-day provision. It was the burden of applicant to show by testimony or other evidence, that she, or her husband, or some agent, attempted to obtain an appointment, or file an application, with the district office, within the

critical time. The record is patently silent as to any evidence that the Department blocked applicant from filing within the 90-day provision's time clock on, or prior to, the critical date of May 1, 1996. Such obviously necessary evidence would be in the control of applicant, or her agents. We do not view the evidentiary burden as too great, for if applicant, or her agents, had contacted the district office for an appointment prior to the critical date, such offered evidence would raise a clear question as to adherence by applicant to the terms of the 90-day rule. The testimony given as to the time delay only begs the question.

We determine that there is no substantial evidence that applicant did, or attempted, some act, to adhere to the requirements of the 90-day provision of the rule.

CONCLUSION

The decision of the Department of Alcoholic Beverage Control is affirmed.[4]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, 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 final 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.