ISSUED MARCH 30, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ANTHONY E. & MARY ANNE GRAHAM dba Patterson's Pub 10485 Lansing Street Mendocino, CA 95460, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6936 File: 48-284001 Reg: 97039403 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: December 3, 1997 San Francisco, CA

Anthony E. Graham & Mary Anne Graham, doing business as Patterson's Pub (appellants), appeal from a decision of the Department of Alcoholic Beverage Control,[1] which denied their petition to modify conditions on their on-sale general public premises license to expand the area of the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and pursuant to Business and Professions Code §23803, based on the rules set forth in California Code of Regulations, title IV,

[1]The decision of the Department, dated September 4, 1997, is set forth in the appendix.

§61.4 (rule 61.4).

Appearances on appeal include appellants Anthony E. Graham & Mary Anne Graham, appearing through their counsel, Anthony E. Graham; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY-

Appellant's on-sale general public premises license was issued on August 27, 1993. During the period of investigation as to issuance of the license, appellants consented to the imposition of three conditions on their pending license.[2-] The original conditions were imposed due to the location of two residences within 100 feet of the premises [exhibit 4]. Appellants now seek to add a garden area to the licensed premises for the sale of beverages including alcoholic beverages. The proposed garden area is located to the side of the premises on the north and includes an area equal to or slightly in excess of the area of the current premises [exhibits 2 and 3].

An administrative hearing was held on June 3, 1997, at which time oral and documentary evidence was received. Numerous witnesses appeared in support of the proposed garden area with the testimony substantiating that the current license has been exercised in a very civil and professional manner. A Department investigator testified as to the fact that there were still two residences within 100 feet of the premises, and that the open area could reasonably create such noise

[2-]The condition concerned in the present matter states: "All sales, service, or consumption of alcoholic beverages shall be within the premises building. There shall be no outdoor use."

that nearby residents could be adversely impacted. Joan Curry, a protestant at the time of the original issuance of the license, testified of her concerns as to the open air garden, the potential for noise, and the late hour schedule rather than a more appropriate lunch and early dinner time schedule.

Subsequent to the hearing, the Department issued its decision which determined that appellants had not met their burden under rule 61.4 to show that the circumstances which created the imposition of the original conditions no longer existed and also, that granting of the modification would not cause interference with the quiet enjoyment of property by the 61.4 residents.[3]

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the issue that the Department's decision's findings are not supported by substantial evidence.

DISCUSSION

Appellants contend that the Department's decision's findings are not supported by substantial evidence. Appellants argue that the premises is an asset to the community, and is well managed; the original conditions were imposed to prohibit sale and consumption on a front porch of the premises; the conditions were

[3]There are two residences within 100 feet of the licensed premises which, therefore, call the rule into question. One is located above the existing premises, and is owned by appellants -- we will not consider whether that resident should be considered under the rule, as such a determination is unnecessary. The other residence is within the rule, notwithstanding the residence is not within 100 feet of the garden area, a fact irrelevant to the present appeal. If the garden area is added as a part of the licensed premises, the measurement per the rule would be from the closest edge of the premises (buildings and garden area combined) to the 61.4 residence, not from the garden area only.

consented to only to avoid protracted litigation; and there is only one residence within 100 feet of the garden area, that being the premises located and owned by appellant, and located above the premises' building.[4-] Appellants request the Appeals Board to instruct the Department to modify the conditions to the license and allow for the garden area with certain time restrictions which are more restrictive than the hours of operation of the premises' building.

The Appeals Board must clarify some foundational considerations here as the Board cannot instruct the Department to issue a decision in the manner requested by appellants.

The Department is authorized by the California Constitution to exercise its discretion whether to grant or deny the issuance of an alcoholic beverage license, or any modification thereto, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. The term "public welfare and morals" is well defined in the case of Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 113]. While the Boreta case, factually, is not a licensing or modification matter, its definition of "public welfare and morals" is in our view, universally helpful. The definition states that public welfare and morals is "a construct of political philosophy" which seeks as a goal "the enhancement of majority interests in safety, health, education, the economy, and the political

[4-]Appellants are in error in their view as to the reach and measurements under rule 61.4. Reference is made to footnote 3 on this subject.

process, to name but a few." To be found contrary to public welfare and morals, the effects of the "cause" must be considered and evaluated as being harmful or undesirable.

The Department sets forth in finding IX that appellants' operations are well managed and a community asset. However, the truth of that finding is not relevant to the present inquiry. The only issue before the Board is set forth in another sentence of finding IX, which states: "The evidence did not establish, however, that operation of the business without the conditions would not interfere with the quiet enjoyment of nearby residents."

Different from the powers and discretion granted to the Department, the scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.[5]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d

[5]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Appellants argue that the original conditions were imposed in order to negate the use of the porch area of the premises for the sale and consumption of alcoholic beverages, and that appellants consented to the imposition of the conditions to avoid protracted litigation which could have held up their initial licensure. Exhibit 4, the Petition for Conditional License signed by appellants, only states that rule 61.4 is the basis for the conditions, and understandably, that sales and consumption on an outdoor porch area of the premises would be of considerable importance to the Department, considering the nearby rule 61.4 residence, as well as other nearby residents who may be affected adversely by outdoor service and consumption.[6]

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[6]The Department may consider whether the outdoor sales and consumption would adversely impact the quiet enjoyment of residents within 100 feet of the premises pursuant to rule 61.4, as well as residents residing beyond 100 feet. Absent the rule, the Department has the burden to show residents beyond 100 feet would be detrimentally impacted, while in the presence of the rule, appellants have the burden to show that their operation will not adversely impact the within-100 feet residents. That burden is a major hurdle in most all licensing and modification

The 61.4 rule is definite:

> "No original issuance 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 ... Distances provided for in this rule shall be measured by airline from the closest edge of any residential structure to the closest edge of the premises ...."

The reasons why appellant consented to the imposition of the conditions are not relevant in this appeal, as the time for contesting that issue has long since passed.

We move now to the dispositive issue in the present appeal. Appellants argue that the garden is intended to provide a place where patrons may eat their lunch as well as enjoy a drink. However, the license allows sale and consumption of distilled spirits as well as beer and wine, and the proposed hours of operation would be until 9 p.m. on most days, and 10 p.m. Friday and Saturday nights.

The United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471, 100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263.)

Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310, and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433,

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matters.

441 [102 Cal.Rptr. 857], the Supreme Court said "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the opinions of experts." Although the Kirby case did not involve a rule 61.4 situation (the closest residence was about 150 feet away), the Court upheld the department's determination that issuance of the license sought therein would, inter alia, interfere with nearby residential quiet enjoyment even though no nearby resident had voiced opposition to the license. The court took note of substantial evidence on both sides of the issue and concluded that the expert witness testimony of the county sheriff was sufficient to support the Department's crucial findings.

The Appeals Board has consistently held that the protection of the quiet enjoyment of one's home is of supreme importance, noting in Hennessey's Tavern, Inc. (1997) AB-6605, "that rule 61.4 is nearly absolute."[7]

Appellants cite two Appeals Board decisions which, upon a full reading, do not support appellants' cause. The case of Aguila Family Trust (1996) AB-6544, was also a condition modification matter wherein the Appeals Board stated that the Department's decision must be reasonable, in that there must be a "reasonable

[7]See also Kassab (1997) AB-6688; Hyun v. Vanco Trading, Inc. (1997) AB-6620; Lopez & Moss (1996) AB-6578; Alsoul (1996) AB-6543, a matter where the Appeals Board raised the rule on its own motion; J.D.B., Inc. (1996) AB-6512; Park (1995) AB-6495; Esparza (1995) AB-6483, and Saing Investments, Inc. (1995) AB-6461.

connection between the problem sought to be eliminated, and the condition designed to eliminate the problem." Noise, the Appeals Board has concluded many times, is a very real factor to residents living near licensed establishments.

The cited case of Lopez & Ramos (1997) AB-6610, while appearing to support appellants from the point of view of the Appeals Board's conclusion, taken in context, is not helpful to appellants. It states:

> "We view, however, the basis for the duty of the Department to refuse to the grant of a license or the removal of a condition imposed due to the close proximity of residences is not merely the fact of nearby residents, but the presence of a reasonable potential for disturbance that such an operation may pose to those residents. Thus, the discretion of the Department must be based upon a fair consideration of the facts as to such a potential, and if thus predicated, is well within the Department's constitutionally granted duty to protect those residents for the public good.
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> "Notwithstanding, this Board concludes the discretion exercised by the Department appears arbitrary based on the peculiar facts of this case. The licensee's application-related-documents show that the common and usual dinner hour from 5 p.m. to 8 or 9 p.m. was not considered by appellants who chose a less conventional closing, listing lunch from 11 a.m. to 6 p.m. It is reasonable to infer that the condition limit of 6 p.m. was more closely linked to the ending of the late lunch period, than to a consideration to protect nearby residents during the period of the usual and normal dinner hour. The Department's foundation for its conclusion that post 6 p.m. (the usual dinner hour period) sales and consumption of alcoholic beverages could adversely impact the nearby residents, is eroded by its [the Department] allowance of such sales and consumption from 8 a.m. to 6 p.m. The failure of reasonable logic and fairness is the failure to consider on the record what, if any, impact the sales and consumption during that usual and normal dinner hour (for clients of appellants and most likely residents of the nearby properties) would have on the public welfare and morals.
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> "Clutching at the technical wording of section 23903's wording that '...grounds which caused the imposition of the conditions no longer exist...' is diametrically opposed to the Legislative gift [to the Department] of discretion. We conclude that a clear view of the problem was clouded by the technical application of an otherwise coherent rule."

Contrary to the Lopez & Ramos case, supra, the garden area would be open until 10 p.m. on Friday and Saturday nights, and until 9 p.m. on other nights of the week. Such hours of service, notwithstanding the argument by appellants, would not simply provide a beer, with lunches, served near noon.

It is reasonable for the Department to determine that such open air activity as proposed could create interference with the nearby residents, especially at night, and in the summer months. The issue of coastal weather is not a valid factor in the present appeal, but could be a factor along with times of day, in any future consideration of the modification request [RT 162-163].

Joan Curry, a protestant during the licensing investigation period (who withdrew her protest when appellants consented to the conditions that sales and consumption be within the premises' building), feared in the present matter that open air and night drinking could create unwanted noise. Apparently, in this very small town, one can hear the seals on the beaches as sound appears to travel some distance [RT 161]. However, the record shows that Joan Curry was not adamant about her protest if an earlier time was sought [RT 162].

CONCLUSION

A reading of the record leaves the Appeals Board with some nostalgia for attempts at informed resolution of differences in legal matters, such as in the present appeal. Great liberality should be shown in the allowance of citizens to prosper in their own way, and conduct their businesses in such a manner as to afford all or many persons the joy of community life so necessary to a healthy

society. The proposed idea of the garden area in this small and unique community is not on its face, improper or unhealthy controlled only by the realities of those who need to be secure in their own places of abode.

We are gratified by the "opening of the door" of a compromise by protestant Joan Curry [RT 162]. This attempt was followed by the Administrative Law Judge who, although unsuccessful in promoting a realistic resolution from the crystallized positions of the parties, gave great time and effort to provide to each party involved an opportunity for resolution which had the best interests of each, and the community, at heart.

Notwithstanding, and upon the legal principles set forth above, the decision of the Department of Alcoholic Beverage Control is affirmed.[8]

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

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[8]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.