

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

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|----------------------------------|---|--------------------------|
| JAMES LISSNER, |) | AB-7009 |
| Appellant/Protestant, |) | |
| |) | File: 41-332735 |
| v. |) | Reg: None |
| |) | |
| MAI JASMINE CORPORATION |) | Administrative Law Judge |
| dba California Beach |) | at the Dept. Hearing: |
| 844 Hermosa Avenue |) | None |
| Hermosa Beach, California 90254, |) | |
| Respondent/Applicant, |) | Date and Place of the |
| |) | Appeals Board Hearing: |
| and |) | May 6, 1998 |
| |) | Los Angeles, CA |
| DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | |
| Respondent. |) | |
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Appellant James Lissner (protestant) appeals from the issuance by the Department of Alcoholic Beverage Control of an interim operating permit for an on-sale general public eating place to respondent/applicant Mai Jasmine Corporation, doing business as California Beach in the city of Hermosa Beach.

Appearances on appeal include appellant, James Lissner; respondent Mai Jasmine Corporation, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Respondent Mai Jasmine Corporation was issued an interim permit for an on-sale public eating place license in the city of Hermosa Beach. The permit issued on or about December 19, 1997. Appellant Lissner, who has filed a protest against the issuance of any license, has appealed from the Department's action granting the interim permit. The Department has moved to dismiss the appeal as premature.

DISCUSSION

Appellant has appealed the Department's issuance of an interim permit for an on-sale general public eating place, contending that the applicant failed to mail written notice of the application to all residents located within a 500-foot radius of the premises, as required by Business and Professions Code §23985.5.

Appellant has filed with his appeal a declaration describing the lengths to which he has gone to identify residences within the 500-foot radius of the proposed premises notice area as to which he claims no notice was furnished. Appellant contends that the Department must rescind the interim permit and cease all activity on the license until the applicant has fully complied with the written notice requirement.

The Department's motion to dismiss the appeal argues that the appeal is premature, and contends that the Appeals Board lacks jurisdiction to hear it. The Department cites Business and Professions Code §23081, which provides that "any party aggrieved by a *final decision* of the Department" may file an appeal with the Appeals Board." (Emphasis supplied.) The Department points out that the issuance of the interim permit is for a limited time, and subject to strict guidelines. If the protests are ultimately upheld, or some other reason why the license should not issue emerges from the hearing on the protests, argues the Department, the license may be denied

and the interim permit is automatically canceled. The Department states that a hearing on appellant's protest had been scheduled to go forward on June 2, 1998, at which time appellant could then have presented evidence regarding his claim that the notice requirement of §23985.5 has not been met. Because of the pendency of this appeal, that hearing has been continued.

Thus, the Department argues, until there has been such a hearing, there has been no final decision from which an appeal may be taken under §23081.

The Department cites Jacobs-Zorne v. Superior Court (1996) 46 Cal.App.4th 1064, 1070 [54 Cal.Rptr.2d 385], a case holding that the court lacked jurisdiction to hear an appeal from a superior court order of summary adjudication entered in a will contest, since the order was interlocutory. The court cited California's "one final judgment rule," pursuant to which interlocutory or interim orders are not appealable, noting the purpose of the rule, which is to prevent piecemeal dispositions and costly multiple appeals which burden the courts and impede the judicial process.

The Department argues, on the merits, that even if appellant's appeal is permissible, it must fail because there has been no hearing and, therefore, no record before this Board which it could review. The Department stresses the fact that, at this stage, appellant's allegations of non-compliance remain unproven; the issues raised by appellant will not be ripe for review until an evidentiary hearing has been completed. Stated another way, appellant has not exhausted his administrative remedies.

Appellant relies principally upon a decision of the Appeals Board in Nasr Masarweh (1995) AB-6494, where the Board held that evidence of non-compliance with §23985.5 was not a basis upon which the Department could deny a license. Appellant

relies upon the following comments of the Appeals Board:

“However, the statute does not give any sanction for non-compliance. The statute expressly states that the license shall not be issued until proof of compliance is filed with the Department, a problematic statement. Compliance appears to be more of a ministerial act demanded by the statute for the unexpressed purpose of giving designated persons notice of the investigative process presumably to allow objections to the issuance, than a violation of the public welfare and morals of the community as alleged in the determinations in the Department’s decision.³

“³ Since a license cannot be issued without a full compliance to the intent as well as the letter of the statute, it would appear that cessation of all proceedings would be the appropriate course of action until there is complete uniformity.

“ In the present matter, the administrative hearing should have been continued (during or after completion of the taking of testimony) until the Department was satisfied that there was full conformity to the requirements of the statute.”

It is clear that the appeal is premature. There is no record for the Board to examine in considering appellant’s claims that the notice requirements of Business and Professions Code §23985.5 were not met. Appellant’s contentions are, at this stage, only contentions. For all anyone knows, any defects in notice, if there are such, will have been cured by the time of the administrative hearing. In other words, the issue is not ripe.

Section 23985.5, by its terms, requires proof of compliance prior to license approval. We understand that to mean final approval, rather than what may be considered the conditional approval which occurs when the Department decides to issue an interim operating permit pursuant to Business and Professions Code §24044.5.

In Nasr Masarweh, cited by appellant, the appeal was from a *final* decision denying the application for a license. Hence, the decision is not authority that the

Board may hear an otherwise interlocutory appeal. Appellant cites the case for the footnote dicta to the Department that it should not have denied issuance of the license on that ground, even though it could hold up issuance pending compliance. As the discussion which follows will demonstrate, that dicta, whether or not it may offer the best solution to the problem, is simply not applicable in the circumstances of this case.

Section 24044.5 of the Business and Professions Code authorizes the Department of Alcoholic Beverage Control, in its discretion, to issue an interim permit to an applicant for a retail license to operate the premises “during the period an application is pending” when, among other things, (1) the application has been protested, and (2) the Department has made a determination based upon its investigation that the license should be issued. Subdivision (b) of §24044.5 provides that the permit is for a period of 120 days, but may be renewed for additional 120-day periods as necessary, upon payment of a \$100 fee and compliance with the conditions required by this section of the statute. Subdivision (b) goes on to provide that the interim permit shall be automatically canceled when a final determination made by the Department regarding the protest becomes effective or when the application for the retail license is withdrawn, whichever comes first.

Section 24044.5 was enacted in 1992. It introduced the concept of interim operating permits, at least one purpose of which, implicit within its terms, was to ease the hardship imposed upon applicants believed by the Department to be worthy of a license, but where the licensing process was delayed by the pendency of protests or other unresolved questions precluding the issuance of the license. It is a matter of common knowledge that many prospective licensees have invested considerably in the

development of the premises they seek to have licensed, and can incur substantial interest expense and other costs while their application is pending. The issuance of an interim permit, in appropriate circumstances, can alleviate that hardship, without sacrificing the rights of any protestant who wishes to be heard before the license issues.¹ Under appellant's suggested approach, these objectives can be totally frustrated if an appeal is permitted at this intermediate stage.

Subdivision (g) of §24044.5 renders the 500-foot notice requirement of §23985.5 inapplicable to the issuance of interim operating permits:

“(g) Refusal by the Department to issue or extend an interim retail permit shall

A similar, but much earlier, limitation on the protest process is reflected in Business and Professions Code §24013, subdivision (b), which permits the Department to reject a protest and issue a license prior to any hearing, compelling the protestant to prove by way of accusation and hearing that the license should be revoked. The purpose of this 1965 legislative amendment to §24013 was discussed extensively in Reimel v. Alcoholic Beverage Control Appeals Board (1968) 263 Cal.App.2d 706 [69 Cal.Rptr. 744, 746-748], where the court held that the Appeals Board lacked jurisdiction to hear an appeal from the Department's rejection of a protest and issuance of a license, subject to a final decision following the hearing on the protest.

“The amendment was sought by the Department to avoid delay in the issuance of licenses to qualified applicants, due to what the Department termed ‘bad protests,’ that is, protests which ‘in the past several years had been increasing in numbers,’ and which the Department found were not founded in fact or were malicious. ...

“The Department has been granted a broad range of power and discretion in deciding whether a particular application for a liquor license should be granted or denied. The courts will permit the Department to work out its problems with as little judicial interference as possible, and an abuse of discretion must appear very clearly before the courts will interfere. ...”

The addition of §24044.5 appears to have a similar objective, that is, to accelerate the time when a potential licensee can commence operations in those instances where the Department is of the view that the protests will not prove to be a bar to the issuance of a license.

not entitle the applicant to petition for the permit pursuant to Section 24011 [right of applicant to petition for license following notice of denial of application], or to a hearing pursuant to Section 24012 [hearing on petition filed pursuant to §24011]. *Articles 2 (commencing with Section 23985) and 3 (commencing with Section 24011) shall not apply to interim retail permits.*" (Emphasis supplied.)

By excluding the ability of an applicant to petition, or a protestant to appeal, the Legislature has made it quite clear that the interim permit process is not intended to be a source of delay by either an applicant or a protestant.

Thus, It seems equally clear that the Legislature intended that the Department have a means to move the licensing process expeditiously, and preserve the rights of all concerned without exposing anyone to undue hardship. The denial to the applicant of any right of appeal, even to the Department, of any decision to deny or extend an interim permit is counterbalanced by the denial to a protestant of the right to raise any issues regarding the issuance of an interim permit. In either case, it is obvious that the legislative purpose was to eliminate intermediate proceedings that would only delay the licensing process and subject the Department to another layer of administrative hearings.

The question of whether there is any merit to appellant's factual contentions is not before the Appeals Board. The Department appears to concede that appellant is entitled to present such evidence as he may have at the hearing on his protest. We venture no opinion on the question whether or to what degree proof of partial non-compliance with the notice requirements of §23985.5 may be a bar to the ultimate issuance of a license. (But see Nasr Masarweh, supra.)

Thus, appellant's appeal is fatally flawed, viewed procedurally as defective because it is an appeal taken prematurely from what is nothing more than an

interlocutory order, or viewed substantively because the objections he has raised are not relevant to the issuance of an interim permit.

For these reasons, we are of the view that, at this time, the Appeals Board lacks jurisdiction to hear the issues appellant purports to raise.

CONCLUSION

The motion of the Department of Alcoholic Beverage Control to dismiss the appeal is granted.²

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

²This 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.