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

AB-7117a
File: 47-318285 Reg: 97038689

USG ENTERPRISES, INC. dba Fantasea Yacht Club
4215 Admiralty Way, Marina Del Rey, CA 90292,
Appellant/Applicant

v.

SANDY ABOUAF, et al.,
Respondents/Protestants,

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 1, 2001
Los Angeles, CA
ISSUED MARCH 5, 2002

USG Enterprises, Inc., doing business as Fantasea Yacht Club (applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied its application for a person-to-person/premises-to-premises transfer of an on-sale general eating place license.

Appearances on appeal include applicant USG Enterprises, Inc., appearing through its counsel, Joshua Kaplan; protestants Sandy Abouaf, Richard Annotico, Jim Bisch, Deanne Beach, Frederick Brown, Frank Daroca, Andrea Daroca, Antonio De La Cruz, Evelyn Frank, Robert Ginsberg, Joseph J. Greenberg, Bernard Jacobson, Joyce Jacobson, Bila Kahan, Robert A. Kaufman, Nathan Krems, Marjorie Krober, Patricia Moore, Hani Musleh, Lina Musleh, Elias

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[1] *The decision of the Department, dated November 30, 2000, is set forth in the appendix.*

Papachristos, Albert Reff, Rhoda Rich, Joel Schultz, Toby Schultz, Edward C. Sharp, Leonard Silverman, Elaine Silverman, Shelly Smolensky, Herbert Sonen, Thomas Vrebalovich, Bette Cole Wexler, and Fred Winograd, appearing through their counsel, Cary S. Reisman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicant applied for a person-to-person/premises-to-premises transfer of an on-sale general eating place license. The premises is a free-standing and unattached building, formerly a restaurant, which is used as a banquet facility, catering to weddings, banquets, corporate events, meetings, and parties. The capacity is approximately 300 patrons. There is a full kitchen and fixed bar. Applicant is presently licensed with an on-sale party boat license which allows for the sales and service of alcoholic beverages on at least two pleasure yachts. Access to the yachts is from a stairwell on the west side of the premises (the farthest point away from the nearby residences).

Protests were filed and an administrative hearing was held over a period of 12 days in 1998, at which time oral and documentary evidence was received. Protestants are residents of the Marina City Club (MCC), a six-tower residential complex, with one of the towers (the southwest tower) in close proximity to the premises with some of the residents being within 100 feet of the proposed premises.

The MCC complex is situated in a large commercial-type area which appears to cater to yacht enthusiasts, high class-dining facilities, other commercial establishments, and bay bathers and attendant parking and support businesses.

The large bay area which houses the high-rise MCC complex, is but a part of a larger commercial development, including apartment complexes situated on about two to three peninsulas mainly surrounded by boat-slip areas.

There are large major hotels and apartment complexes north of the MCC complex, across Admiralty Way, a busy highway running past the MCC complex. On the south side of Admiralty Way, directly opposite the hotel and apartment complexes, are restaurants and a large hotel. Opposite these restaurants and hotel on the south side is a public beach.

In our previous decision (AB-7117), the Appeals Board described the area:

> "The premises is located next to the southwest tower of the MCC complex. Such complex is located beside a large grouping of yacht slips or docking facilities, estimated at 16 slip structures along the area abutting the MCC complex, with other slips in close proximity, equaling about 550 slips in the immediate area of the premises and MCC complex. The bay area, which includes the slips, is a large water and land complex, with many slips, hotels, and other commercial structures. The slips in this bay area are estimated to be in excess of 6,500.[2] The area is an amalgamation of water sport and yacht access living, where the usual quest for quiet enjoyment has been voluntarily compromised for the pursuit of pleasure and water amenities. Valet parking provides that cars be taken to a subterranean parking area under the MCC complex where 200 spaces have been leased. There is a public parking area across Admiralty Way, with 150 spaces available. There are approximately 40-50 parking spaces in front of the premises."

Subsequent to the first administrative hearing in 1998, the Department issued its decision which determined that the protests should be sustained in part and denied in part and the application should be denied. Applicant thereafter filed a timely notice of appeal. The Appeals Board (in AB-7117) reversed the decision

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[2] *Exhibits 5-B and 5-H (in the first decision of the Department) show the MCC southwest tower and the premises with its parking lot. Exhibits C and D show the many and varied complexes in the area, the premises, the MCC towers, and the large bay area with its many boat slips. [Exhibit D is set forth in the appendix in the present matter.]*

of the Department and remanded the matter to the Department to conduct further proceedings in which applicant could properly attempt to sustain its burden to show non-interference with nearby residents, concluding that the rights of applicant had flagrantly been violated.

The Appeals Board also stated in its decision:

"... there appears to us that there is required somewhat of a balancing of residential quiet enjoyment and commercial enterprises. *This appears so considering that the rule[3] does not appear to be designed for this particular type of multifarious locations and activities, but mainly designed to protect typical residential communities' quiet enjoyment. But, here, the area is noise generating, designed for activities by being surrounded by a virtual sea of hotels, dining establishments, and boating – a "fun city."*

"We, therefore, view that the residents of MCC have less of an expectation of total quiet enjoyment in this highly commercial area, than a resident in a bedroom community surrounded by like-minded seekers of quiet and tranquility. As the exhibits tend to depict, these MCC residents have opted for a location that is not the typical quiet residential area, but one of day and night activity and commotion. The MCC high-rise homes are surrounded by huge boating enterprises of which applicant's yacht license and operation are but one of many, plus two major highways with apparent constant noise, and an area filled with local business enterprises, which all are a part of and create the ambiences of noise and congestion that appear to be a part of the community to which the residents of MCC have chosen to be affiliated, and be included in (this area of commotion and enterprise).

"It appears that the problem is not the proposed internal operation, that of a banquet facility (or even of a usual type restaurant if applicant changed its operation to a restaurant), but the movement of patrons from the premises to their awaiting cars. A major impediment to understanding the problem is that most all the testimony confuses the yacht operation with the proposed banquet operation.

"It appears to be highly questionable, to allow extremely voluminous testimony to show noise and congregation of patron problems associated with the yacht operation where the patrons all leaving at the same time, yet base the decision on almost non-existent complaints and evidence, of the presently applied-for operation. If the intent of the Department or the Administrative Law Judge (ALJ) was to show the obvious yacht problem as a basis for denial of the application for a license for the banquet facility, they are obviously misguided with such "guilt by association," and acted in a highly objectionable manner. We note that there are no conditions or restraints on the yacht operation. The license under consideration in this appeal concerns a banquet operation for a private group or groups. The Department, while imposing conditions if the license is to issue, ignores the potential for congestion in the parking lot problem by only partially conditioning the license sufficient to resolve the problems that could be created. Since the congestion problem in

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[3] *Rule 61.4 states: "No original issuance of a retail license ... shall be approved for premises [which are] located within 100 feet of a residence ... Notwithstanding, the department may issue an original retail license ... where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents."*

the parking lot is the most important focus, the obvious lack of conditions which could speak to that problem, borders on the incredible."

The Department after its first decision was reversed, conducted further hearings over four days, again denying the license, with applicant again appealing.

In its appeal, applicant raises the issue that the findings of the Department are not supported by substantial evidence.

DISCUSSION

When, as in the present 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].) "Substantial evidence" is relevant evidence which reasonable minds would accept as 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 864, 871 [269 Cal.Rptr. 647].)

Also, as in the present matter, where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v.

Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].

Applicant modified the original conditions and crafted the modifications and additional conditions to a total of 26 conditions. The decision of the Department under section entitled "C. Findings of Fact," states:

> "This revised set of conditions differ in material respects from the original conditions ... [1] reducing the late closing hour of the premises by an hour earlier than originally proposed, the Applicant has taken a step in addressing the late night noise issues of the residents ... [2] preclude patron parking in the small parking spaces in front of the premises ... [3] requiring patrons to exit the premises through a side door located on the western-most portion of the premises [farthest away from the residents] ... [4] vehicles be lined up on the parking lot for delivery to patrons one at a time may not be practical or effective ... [and 5] ... taking into account the Appeals Board holding that residents of [MCC] have less of an expectation of total quiet enjoyment in this highly commercial area than a resident of a bedroom community, the Applicant's proposed conditions overall can reasonably be argued to offer a basis for a solution to the problem of residential quiet enjoyment ...."

Notwithstanding the Administrative Law Judge's (ALJ) view that the restrictive conditions proposed by applicant can be seen as a reasonable solution, he stated:

> "4. However, even given these more numerous and restrictive conditions, the [ALJ] has serious doubts that the Applicant would refrain from interfering with the quiet enjoyment of adjoining residents should the license issue.
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> "5. An examination of the evidence of the two years preceding the remanded hearing, makes it clear that the applicant was aware of the pendency of these proceedings and of the protests of numerous residents living in the adjacent buildings. During this time one might have reasonably expected the Applicant to enforce some of the more needed of the 23 conditions it had proposed in the original hearing proceedings. Condition No. 8 of the original proposed conditions provided that the Petitioner 'shall maintain order (in the surface parking lot) and prevent any activity which would interfere with the quiet enjoyment of nearby residents.'

> "However, on at least a dozen occasions in 1999 and 2000, in the late evening and night hours, residents whose condominiums overlooked the premises were disturbed by singing, talking and shouting of patrons outside the premises. Car horns and alarms pierced the air, and there was noise from slamming doors and engine and noise of cars leaving the premises.
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> "Neither valet parking attendants nor representatives of the Applicant appeared to attempt to quell the disturbances. On several occasions, chauffeur driven limousines picking up banquet facility patrons caused traffic problems, both in the surface parking lot and on Admiralty Way, resulting in additional unreasonable and disturbing noise to residents.
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> "Thus, when the Applicant should have been on its best behavior (during the pendency of the appeal and remand proceedings), it was either unwilling or unable to control crowd noise. Can one then ask, if the Applicant will not control crowd noise while it is under some scrutiny by the Department and the Protestants and before it has secured its license, is it reasonable to believe that it will be inclined to control it after issuance of a conditioned license? The answer unfortunately is no."

The ALJ made the following comment before setting forth the statements shown above: "[t]here is ample evidence in the record that the Applicant has demonstrated an inability or unconcern in controlling such disturbances in the past, despite awareness of their occurrence, to the late night detriment of nearby residents."

From our review of the record, we conclude that it is incorrect that in 1999 and 2000, as stated above, there were major disturbances, and in the numbers cited by the ALJ. It is our view that the hearing, like the prior hearing, was not conducted in a fair manner.

Before proceeding with the review of the Department's decision, we feel constrained to pause and call attention to our concern that this matter was allowed to proceed in such a manner that justice and fairness were mainly ignored.

Our first concern is that applicant, protestants, and the Department, have all missed the point of our prior decision that sought to have

the Department consider that the dynamics of this matter are heavily weighed against the use of the usual residential quiet enjoyment thought process.[4] The usual mixture considerations of residential and commercial in the same general area is not applicable in the present matter. Such usual mixture does not call for other than the usual comparison of nearby residences and nearby commercial enterprises, and the impact of commercial enterprises on those nearby residents. Our review of past decisions of the Appeals Board shows that we have adhered to the same rule thought process, be it a residential, or a residential/commercial, mixture.

This matter is different. The present matter is not the usual residential/commercial mix, even though the decision of the Department and the briefs of the parties appear to so claim, but a scene of day and night activity which caters to a very different life style and noise generating ambiance, far in excess of that which the usual residential, or the usual residential/commercial area could foreseeably ever produce. It seemed to the Board in our prior decision (AB-7117) that this area of high activity made up of many and varied noise generating enticements, would necessitate some noticeable observation by the ALJ and the Department, that something more was needed in properly balancing the realities of the area. We observe that people, including state agencies, should not function in a one-dimensional setting, but one which demands observant and intelligent evaluation of all the factors. Thus, our observation in our prior matter (AB-7117), was not a new standard, as alleged in the Department's decision, but a call to those who must reevaluate the problem, to avoid the "business as usual" mentality, but to give due consideration to all the factors, which go into the mixture of the decision making process, by acknowledging reality, and grappling with the need for intelligent thought activity. We feel that such a need has been almost totally ignored.

This leads to our second concern, that of clear disrespect shown the prior decision of this tribunal (AB-7117) by the Department's decision making management:

> "Q. Mr. Mimiaga [District Administrator of the Department], you testified earlier that it is still today the Department's recommendation that this application be denied; is that correct?
> "A. Correct.
> "Q. And In making that determination that it's still today a recommendation of denial, have you utilized in that decision the directive of the Appeals Board that residents of MCC have less of an expectation to have total quiet enjoyment than the residents in a bedroom community?
> "A. I do not interpret that as a directive to me.
> "Q. You did not?

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[4] See the Department's decision, section B, entitled Appeals Board Mandate. For a statement of the rule which is a predominant factor in the present matter, see footnote 3, above.

"A. I do not." (RT 8/29/00, p. 66.)

* * *

"Q. Mr. Mimiaga, the sentence I've been reading from the Appeals Board decision on page 9 has not been a factor at all in your continued recommendation of denial; is that correct?

"A. I'm aware of what that statement says. Irrespective of that, I still maintain my same position.

"Q. Sir, I know you're aware of it. Isn't it an accurate statement to say that you don't agree with it?

"A. Correct.

"Q. Is it an accurate statement to say that you didn't take it into consideration at all in still maintaining the recommendation of denial?

"A. No, I cannot say that." [RT 8/29/00, p. 67.]

* * *

"Q. You did consider then, that they [residents of MCC] have less expectation of quiet enjoyment at MCC.

"A. I did take it into consideration what they [the Board] said.

"Q. But you're not following it?

"A. I did not feel it was a mandate for me to follow." [RT 8/29/00, p. 68.]

* * *

We, members of the Board, must ask ourselves, that with this attitude and a record process that is unexplainable, does not the present appellate process of which we are now concerned, become meaningless, and only a mere empty shell to appease the appearance of a fair hearing and meaningful review of government conduct? We fully understand that higher appellate tribunals have greater jurisdictions to command adherence, while we can only observe, rule, and hope that the recipients of our decisions are benefitted thereby. We feel that these concerns were needed to be expressed as we do feel that the record is not what should be justly desired by all parties.

In the first decision of the Appeals Board (AB-7117), we pointed out the illogical problem of the ALJ allowing testimony and evidence that mixed people movement of the yacht operation and those of the banquet facility. We pointed out that "It appears to be highly questionable, to allow extremely voluminous testimony to show noise and congregation of patron problems associated with the yacht operation (licensed under their own license) with the patrons all leaving at the same time, yet base the decision [against licensing the banquet facility] on almost non-existent complaints and unproven evidence, of the presently applied-for operation." The problems of the Department's first decision, and the subsequent Appeals Board decision (AB-7117), calling attention to that problem, seems to be ignored by protestants in the present review, who argue that whether it is a yacht event parking lot noise or a banquet facility parking lot noise, it is the same, and no matter the originating event, noise from the parking lot disturbs the residents [RT 8/30/00, p. 85, and p. 94-95].

In the present matter, protestants caused three videotapes to be placed into evidence, showing days and nights of people movement, great

and small, in the parking lot in front of the premises (Exhibits R-V, R-VJ, and R-VJD). While placed into evidence, the tapes are highly questionable as to value, and extremely prejudicial in the manner they were screened before the ALJ. Even with these defects, the videos overall show an orderly movement of people.

Originally, the tapes recorded by Dr. Albert Reff, one of the protestants, in his camera, were recorded on an 8-millimeter format. A professional firm converted the tapes to the VHS format. The VHS tapes were admitted into evidence, and the 8-millimeter tapes were refused by the ALJ to be marked as an exhibit. Counsel for protestants told the ALJ the VHS records were an exact duplicate of the 8-millimeter tapes [RT8/30/00, pp. 9-10, 13-14, 28-30].

A witness, Kanchan Chaudhery, who caused the transcription, had no idea if the person who originally recorded the tapes (8-millimeter) had enhanced the volume [RT8/30/00, p. 31]. We note from the record a question being raised as to why the volume was higher on the 8/31/00 playback, than a lower volume on the preceding date. The discussion and answer left much to be desired [RT 8/31/00, pp. 27-28].[5] And with all this comment as to transcribing, and the subjective control of volume by the operator of the camera, such does not appear to have made any impact on the ALJ or the Department.

While the tapes shown appear to be a sufficient showing of people and car movement on the dates taken, and a valid evidentiary item for that issue, sound is a different matter. There is no evidence that a sound meter was used. It would appear quite elementary that if there is no sound meter, then the logical question is how do we know there was too much noise, and in comparison to what? Such taping of noise is a very unreliable indicator of noise, and easily manipulated as to volume, as the record shows. To properly consider any noise evaluation, it appears to us that the background noise (heavy highway traffic) should be eliminated from the total amount of noise. Additionally, common knowledge dictates that there are many variables involved in recording and playback in recording noise. One factor is wind passing over and around the microphone, which easily causes a distortion, something alluded to in our review of the tape playback.[6] The tape evidence as to noise was highly suspect, and without more evidence of propriety, should have been stricken.

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[5] Additionally, the same type objection was found as to the screening of the October 17, 1999, yacht activity [RT8/30/00, pp. 110, 112]. A further discussion as to the subjective control of volume concerned the May 28, 2000, yacht activity, where the doctor stated that volume was due to his, the doctor's "subjective" sense [RT8/31/00, pp. 27-28].

[6] The record shows that the videos were taken on the 11th floor of the closest high-rise, on the balcony.

We conclude that there are sufficient variables involved in noise accumulation and playback, that a single tape recording of an offending sound is very unreliable and improper as evidence.

We next proceed to the viewing of the tapes with a protestant, Dr. Reff, giving to the ALJ his evaluation and setting forth implications of the tape showings. The doctor was allowed to explain where the sounds came from, who was honking the horns, and the situs of many of the sounds unidentified as to source. Such blatant subjective opinion testimony should have been rejected by the ALJ [RT8/30/00, pp. 45-125, and RT8/31/00, pp. 6-76]. Such flagrant abuse by the witness of inserting the doctor's own particular interpretation of the tapes, and the ALJ's ready adherence to this evidentiary charade, is inexcusable.

Finally, we proceed to our viewing of the tapes.

Exhibit R-J is entitled Index to Fantasea Short Tapes, and lists by date and counter numbers the taping sequences. Applicant testified that the banquet facility operations occurred on dates underlined in yellow with the unlined dates that which was activity from the yacht operations, an apparent fact which the record strongly suggest:

Banquet Facility Dates	Yacht Only Operation Dates
May 29, 1999	August 11, 1999
July 24, 1999	August 12, 1999
July 31, 1999	August 15, 1999
December 8, 1999	August 21, 1999
December 10, 1999	September 16, 1999
May 28, 2000	October 17, 1999
June 3 & 4, 2000	December 19, 1999
	June 16, 2000

Apparently, from the testimony, there were yacht events on each of the dates the banquet facilities were in operation. Additionally, the tapes show non-banquet facility events.

We have set forth the doctor's views of what the tapes show, and our view as to the tapes.

May 29, 1999 (Banquet and Yacht)

The doctor's testimony was that which all the people at the hearing could see and hear. The time of the events shown is alleged to be after 11pm. But the description as testified to, the degree of the noise, how long the honking continued, except for general description which can convey

on the written page (the transcript) a different scene than the tapes show, was not what the Board saw. This to the Board is why the doctor's editorialization creates a false impression of the record, and is an affront to a fair hearing. We find this type of objectionable testimony throughout the tapes [RT8/3/00, pp. 45-56].

The Board's review of the tape shows people coming and going into the banquet facility. There is a constant low grade noise from an unknown source, but does not appear to come from the parking lot or the nearby highway. It is not people noise. We note an occasional scream, talking from time to time, and an occasional honking of a horn from some unknown location. There is shown an orderly egress from the premises. There is relatively "little noise" overall. The tapes show actual yacht activity. Overall, our assessment of the tape is that the doctor's testimony convoluted the real scene, which we found relatively mild in impact.

July, 24, 1999 (Banquet and Yacht)

The doctor's testimony told of a scraping sound as two vehicles drove over a curb. A beeping noise is heard apparently caused by the backing up of a van. A horn is honked. The time is alleged to be after 11pm. The doctor stated that he did not take purely yacht activity, but the Board determines this is not a true statement as shown in the tapes [RT8/30/00, pp. 56-67].

The Board's observation of the tapes showed people milling about in front of the premises. There is pronounced noise coming from the highway, with a motorcycle revving an engine, apparently on the highway. Some people are from the premises, but yacht people were present also, as the evidence shows. Despite hearing some talking, the scene is relatively quiet, with orderliness in the movement of people.

July 31, 1999 (Banquet and Yacht)

The doctor's testimony states the event seems to be the later part of the banquet facility event, with noise from car doors slamming, valet yelling, and car door alarms activitated. The time was alleged as 10:30pm [RT8/30/00, pp.67-70].

The Board after viewing the tape, notes even with some talking being heard, and an alarm going off at some undetermined location, the scene is relatively quiet.

August 11, 1999 (Yacht only)

The Board reviewed this portion of the tape and came to the conclusion the event was a yacht function, which was borne out by testimony. We note the very large group was quiet and orderly with cars leaving in an orderly manner. However, the doctor laments in his testimony that

the whole process is like "Chinese torture" in that noise is unpredictable and thus unnerving.

August 12, 1999 (Yacht only)

The record shows this was a yacht activity, and we note there was an orderly movement of cars out the parking lot. Almost no noise, with many people waiting for cars.

August 15, 1999 (Yacht only)

The record shows this was a yacht activity. The Board notes that there were crowds with cars orderly proceeding into the highway. There was occasional honking, but most of the honking seems to come from the highway. Some slight indication of talking with some laughter.

August 21, 1999 (Yacht only)

The tape shows crowds, with orderly car exiting. Little noise. However, the doctor described the crowd as "carousing," not appropriate for describing the conduct of the persons observed, for there was no indication of a drinking bout.

We also feel that the comments made about the tapes not shown at the hearing, as having the same noise factors as the tapes shown and viewed, were improper[7] [RT8/30/00, p. 99, 107-108].

September 16, 1999 (Yacht only)

The tape shows the parking lot filed with two buses, with a congregation of people near the buses, with little noise. The premises appears closed. The record shows this was a yacht activity.

October 17, 1999 (Yacht only)

The tape shows a daytime event, with some screams, and some laughter. The record shows this is a yacht activity. There is discussion in the hearing to the fact that the recording of noise on this date was lower in volume than previous, and that sound volume was a subjective view of the doctor [RT8/30/00, pp. 110, 112].

December 8, 1999 (Banquet and Yacht)

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[7] The event was a daytime event. Protestants' counsel stated: "It is an opportunity to show the same in more detail and more clearly the same kinds of things that go on at night, which are more difficult to see. One of the valet tactics of honking and coming out and looking for the person and so on, it's just more clear, and so, incidently, it makes it clear just how audible any yelling and screaming is because that's the same, regardless of the time of day. It primarily was to, in daylight (there is a blank space in the record) demonstrate the same kind of things that go on at night."

The doctor testified to hearing noise from cars and loud yelling.

The Board notes that the premises was in operation, some talking, and some yelling, but low keyed.

December 10, 1999 (Banquet and Yacht)

The doctor testified that people were leaving the area by car (the tape was fast forwarded and stopped). The doctor than volunteered: "This constant level of talking, loud talking and yelling and screaming can just drive you mad [RT8/30/00, p. 117]. The time of the event was 11pm or later.

The Board notes from the tape that there were many cars, with a large crowd apparently waiting for their cars. Good order, little noise, some laughter, and a nearby highway auto revving its motor.

December 19, 1999 (Yacht only)

The tape shows a small daytime crowd, with minimal noise. It appears to be, and the record shows, this was a yacht activity.

May 28, 2000 (Banquet and Yacht)

The doctor testified to a wedding group in the parking lot, with loud screaming (a discussion as to the higher volume in the day's playback than usual), with the doctor stating the volume is due to his "subjective" sense [RT8/31/00, pp. 27-28].

The Board noted that there was yelling from the boat area, and some type of undetermined background noise. It appears to the Board that there was a wedding in its final stages as a horse drawn carriage was present. The noise level was low at the wedding location.

June 3, 2000 (Banquet and Yacht)

The doctor testified that limousines were lined up on the nearby major highway. Alarms were heard which the doctor attributed to the banquet facilities [RT8/31/00, p. 40]. The doctor stated the limo traffic was greater then than ever before.

Tape review by the Board is that there is a constant undeterminable background noise, the cause and origin unknown. Yelling is heard. There was heavy traffic of cars in the parking lot in front of the premises, with honking from time to time. Confusion was very evident. Noise was high.

Applicant testified that on the June 3 and 4 dates, the major congestion and multiple limousines were not for the activities at the banquet facilities. The problem was that another school graduation party scheduled at another restaurant, came in error to the banquet premises

address [RT 9/1/00, pp. 64-65].

ORDER

We therefore conclude that there is not substantial evidence supportive of the decision. The record does not support the findings. The bulk of the demonstrative evidence was improperly included into the record. The same problem of dwelling on the yacht operation as a reason to deny the application was obvious. The record in this matter shows contrary to the comments of the ALJ, that the control of groups was evident, in comparison to the record in the prior matter (AB-7117). Applicant did not receive a fair hearing despite the voluminous record.

Whether the license should or should not granted is a matter for the Department, but it must act with fairness, quite absent in the present matter.

The decision of the Department is reversed.[8]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[8] 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 order as provided by §23090.7 of said code.

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