ISSUED MAY 25, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HYUN HUH dba Komma 400 South Western Avenue Los Angeles, CA 90020, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7155 File: 47-252486 Reg: 98042460 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: April 1, 1999 Los Angeles, CA

Hyun Huh, doing business as Komma (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied his application for removal and/or modification of certain conditions imposed upon his on-sale general public eating place license at the time it was issued in November 1990.

Appearances on appeal include appellant Hyun Huh, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

[1] The decision of the Department, dated June 4, 1998, is set forth in the appendix.

Appellant's application for a transfer to him of a previously-issued on-sale general public eating place license was granted in November 1990. A number of conditions were at that time imposed upon the license in connection with the transfer, as the result of concerns shared by the Department and the Los Angeles Police Department about appellant's ability to operate a bona fide public eating place, as well as the fact that the premises was in an area of undue concentration of licenses and in close proximity to residences, implicating Department Rules 61.3 and 61.4.

In September 1997, appellant petitioned the Department to delete conditions 7 and 8 and to modify condition 11.[2] The Department denied the petition, appellant requested a hearing, and this appeal follows the renewed denial of his petition after the hearing.

The hearing took place on April 2, 1998. At that time, appellant modified his request in part, seeking to modify rather than delete in its entirety condition 7.[3] Thus, by the changes he requested, appellant sought to charge admission for as many as six special events each year, and to sell distilled spirits by the bottle rather than by the individual drink.

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[2] The conditions at issue read as follows: 7. At no time shall there be a fee for entrance/admittance into the premises. 8. At no time shall there be a minimum drink requirement. 11. Distilled spirits shall be sold by the individual drink only; sale of distilled spirits by the bottle is prohibited.

The request to modify condition 8 was withdrawn at the hearing [RT 5].

[3] The condition, as modified, would provide: "At no time shall there be a fee for entrance/admittance into the premises except for special entertainments at which no noise shall be audible beyond the licensed premises in which licensee shall maintain a minimum of two uniformed security guards with said events to occur at a maximum of six times per year."

Department investigator Chiquita Walker testified at the hearing that she conducted the investigation that ultimately led to the denial of appellant's request. She testified that she spoke to the managers of two residential structures located within 100 feet of the licensed premises, and both told her they wished the existing conditions to remain in place. Each of them complained to her about noise emanating from the premises and one of them reported tenant complaints about problems in the area with the location of the premises. In addition, she testified that she reviewed the crime statistics for the area, and concluded the premises continued to be located in what would constitute a high crime area. On cross-examination, Walker admitted she had not spoken to any of the individual tenants of either of the residential structures, and that no investigation had been conducted by the Department to verify the validity of the noise complaints which were reported to her. She concluded that because the factors which led to the conditions being placed on the license in the first instance had not changed, the application should be denied. In addition, it was her belief that sale of distilled spirits by the bottle would result in additional noise from patrons leaving the premises, by virtue of having consumed larger amounts of alcohol. She admitted she had no knowledge of appellant ever having served intoxicated patrons, or of the arrest of appellant's patrons for any of a variety of reasons related to the operation of the premises. Walker acknowledged her awareness of the Korean custom in which a host prefers to buy a bottle of distilled spirits and pour for his guests, and that, while she could not name any, she was sure there were restaurants catering to Korean clientele which sold distilled spirits by the bottle.

On redirect examination, Walker confirmed her awareness in the course of the

investigation that appellant had been warned and disciplined in the past for selling distilled spirits by the bottle.

Sergeant Michael Carradine of the Los Angeles Police Department, the police officer in charge of the Wilshire Area Vice Unit, also testified. He said he had been asked by Walker for his concerns regarding the proposed change or removal of conditions. Sergeant Carradine testified the location had been the subject of noise complaints from nearby residents, and was located in an area where there had been an increase in Korean gang activity. His principal concern was the possible snowballing effect if other locations were to seek permission to sell by the bottle. He was less concerned about the request for permission to hold special events, if the noise could be confined to the interior of the premises. He expressed his concern that people would drink more if buying by the bottle, and that gang members would congregate where that was permitted.

Appellant Huh testified on his own behalf. He said he has operated the restaurant for seven years, caters to an exclusively Korean clientele, and has never heard of gang members coming to his restaurant. He described the Korean custom regarding distilled spirits as a preference for a host to pour for a guest, as a matter of respect, rather than being served by a waiter or waitress. He said customers would leave when they find they cannot purchase distilled spirits by the bottle. He denied receiving noise complaints from the managers of the nearby residential units, stating he had been told by one of them, Olga Toderova, that she had told the investigator there was no problem. Huh said that several years ago, Toderova had suggested he post a security guard on the corner to control noise, and that he had done so.

Appellant's counsel argued that there was no evidence of any connection between the sale of distilled spirits by the bottle and interference with quiet enjoyment or adverse impact on crime. He stressed the absence of any arrests associated with the premises, and the desire of appellant's patrons to enjoy what he described as a well-recognized custom.

Department counsel countered with the argument that sale by the bottle defeats the ability to control consumption by intoxicated patrons, and that the increased consumption together with the 2:00 a.m. closing time of the restaurant would continue to create noise problems. He also argued that the special events which appellant contemplated would be likely to draw increased crowds, and while the entertainment might be confined to the interior of the premises, there would be increased noise when the patrons departed after the entertainment concluded.

Following the conclusion of the hearing, the Administrative Law Judge (ALJ) issued his decision, adopted by the Department without change, denying appellant's request for modification. The ALJ found that it was obvious that condition 7 was placed on the license to prevent the restaurant from being a nightclub, especially because of its proximity to residences. Therefore, considering the apartment managers' concerns about noise, the Department was well within its discretion in denying the modification for special events. As for condition 11, he felt the Department had raised valid reasons for objecting to the request; the Department had argued that if distilled spirits were sold by the bottle, the licensee would lose control over which persons would consume the

alcoholic beverage.[4] Finally, the ALJ concluded appellant had failed to meet the legal burden imposed upon appellant by Business and Professions Code §23803 (obligating the licensee to show that the reasons which gave rise to the conditions had ceased to exist).

Appellant has filed a timely notice of appeal, and now contends that the decision is not supported by the findings and the findings are not supported by substantial evidence.

DISCUSSION

Appellant contends that the decision is not supported by the findings, which, in turn, are not supported by substantial evidence.

"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 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellant argues that the record fails to establish any factual or legal basis between allowing the sale of distilled spirits by the bottle and interference with quiet enjoyment or adverse impact on crime. He cites the absence of any substantial evidence of any statistical study or empirical evidence that there is more consumption of alcohol by individuals in a party of three or more who share a bottle rather than order individual drinks. In addition, he argues that there is no substantial evidence that the

[4] The ALJ gave little weight to the Los Angeles Police Department objection that the sale of distilled spirits by the bottle would attract gang members to the restaurant, stating there was no evidence to support that concern.

requested modification of the conditions would interfere with quiet enjoyment or implicate any crime problems, asserting that it is nothing more than conjecture or surmise that some people will drink more, become noisier and then cause problems in the community.

It follows, appellant argues, that he has met his burden under §23803. He acknowledges that the conditions were imposed when it was anticipated that operation of the licensed premises might interfere with the quiet enjoyment of the surrounding residents, but argues that seven years of operations without incident is proof that he has, can and will operate his premises in a manner that insures no interference will occur.

Appellant places great weight on the fact that there has been no incident in the past seven years, and that only one resident has complained.

It could be said that the restriction on the sale of distilled spirits by the bottle is one of the reasons there have been no incidents in the past. Rescission of the condition would amount to an experiment whether it was really necessary. So long as it is reasonably satisfied that the grounds which led to the imposition of the condition continue to exist, it need not order its removal.

Appellant's premises remain surrounded by apartment dwellers. The potential for interference with their quiet enjoyment continues to exist.

There is no question that excessive consumption of alcoholic beverages can generate socially unacceptable events. The risk of overindulgence resulting from the sale of distilled spirits by the bottle can not really be ignored, and the Department does not have to turn a blind eye to such risks simply because appellant says they won't

occur.

The fact that few of the residents have actually registered complaints is of little significance. It may well be that appellant's patrons have been quiet in the past. The Department, however, must look to a more-difficult-to-predict future, and unless it could be said that its concerns are unreasonable, they must be respected.

Appellant cites a 1992 decision[5] of the Board which thought the Department might have been "super technical" in denying a petition for the modification of a condition which prohibited sales of alcoholic beverages after 10:00 p.m. In that case, the area around the premises at the time the condition was placed on the license was dark and graffiti-covered, a problem area with drinking and crime during the night hours. The Department denied the modification because there had been no change in the grounds which caused the condition to be imposed - the presence of eighteen residential units within 100 feet.

The Board remanded the case to the Department for reconsideration, influenced by the efforts of the licensee in persistently painting over graffiti, installing lighting near the alley, hiring a part-time security guard and working with his neighbors in eliminating problems. Thus, although there was no change in the fact that residential units were still located within 100 feet of the premise, there appeared to have been an elimination of gang activity and other disturbances in the rear alley which separated the residential units from the licensed premises.

The Board was also influenced by the fact that other nearby restaurants do not close

[5] Moges Gebre-Mariam (1992) AB-6117 (miscited by appellant as AB-6177).

until 1:00 a.m., and have operated without disturbances.

The Moges Gebre-Mariam case is one with its own peculiar facts, and offers little in the way of precedential value for this case. Appellant cites the case for the proposition that even without geographic or residential changes, the operational history of the licensee and the current attitude of the community are sufficient to constitute changed circumstances. We agree with appellant to the extent those factors may be considered, but not to the extent they control the Department's discretion.

ORDER

The decision of the Department is affirmed.[6]

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

[6] 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.