

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

BARBARA D. KELLY et al.	)	AB-7350a
Appellants/Protestants,	)	
	)	File: 47-340761
v.	)	Reg: 98044362
	)	
IL FORNAIO AMERICA	)	Administrative Law Judge
CORPORATION	)	at the Dept. Hearing:
dba Il Fornaio	)	Rodolfo Echeverria
1333 First Street	)	
Coronado, CA 92118,	)	Date and Place of the
Respondent/Applicant, and	)	Appeals Board Hearing:
	)	February 3, 2000
DEPARTMENT OF ALCOHOLIC	)	Los Angeles, CA
BEVERAGE CONTROL,	)	
Respondent.	)	
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Barbara D. Kelly, Carolyn A. Kephart, Michael D. Kephart, Patricia M. Kieffer, Robert W. Kieffer, Daniel K. Pope, IV, Evelyn R. Pope, Barbara O. Roswell, Ervin B. Rubey, Mary R. Rubey, Galen Schelb, Geraldine H. Shaw, A. Swagemakers, Margaret V. Swagemakers, Annabelle A. Talmadge, Charles J. Talmadge, Betty J. White, Charles E. White, Barbara Wood, and Betty Yerger (protestants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which overruled their protests against a person to person/premises to premises transfer of an on-

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<sup>1</sup>The Decision Following Appeals Board Decision dated August 17, 1999, is set forth in the appendix.

sale general bona fide public eating place license to Il Fornaio America Corporation (applicant).

Appearances on appeal include appellants who are the protestants listed herein, appearing through their counsel, Gerald Cardinale and James Swiderski; applicant Il Fornaio America Corporation, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

#### FACTS AND PROCEDURAL HISTORY

Applicant on March 17, 1998, filed an application with the Department for a person to person/premises to premises transfer of an on-sale general bona fide eating place license, for placement on a site abutting the San Diego Bay on the Coronado side.

On May 26, 1998, and during the Department's investigation of the transfer, applicant consented to the imposition of 17 conditions on the license if the license were to be issued. One of the reasons for the imposition of the conditions was that there are residents within 100 feet of the parking lot. The conditions imposed a limitation on the premises' operation as follows: (1) (sale of alcoholic beverages) closing at midnight on weekdays and 1:00 a.m. on weekends, closure of the patio one hour before the main premises closing, and no reduced-price promotions; (2) (Interior Considerations) quarterly gross sales of alcoholic beverages to be no more than 40% of the food sales, off-sale privileges reduced, no video games or pool type tables, no live entertainment to be provided, no dancing, and rear door access

controlled; (3) (Exterior Considerations) adequate parking lot lighting, no loitering, control of litter and trash disposal, and interior and exterior restaurant noise not to be audible beyond areas under the control of applicant.

Testimony in the original matter tended to show that the premises would be an enhancement to tourism from the City of San Diego area with and after its many late night attractions, as well as to people who reside in the Coronado area.

Apparently, these after-hour attractions are some of the reasons for the unusually early morning operations (1 a.m. closing on week-ends) contemplated by applicant.

Protestants contended in the original matter that the Department's Rule 61.4<sup>2</sup> prohibits the granting of the license because there are residents within 100 feet of the premises or its parking lot, and applicant failed to prove that its operation would not interfere with the residents' quiet enjoyment.

The Appeals Board issued its decision that the Department's decision to issue the license should be affirmed, but reversed and remanded the decision for the Department to revisit and protect nearby residents as required by the Department's own rules.

The Department thereafter issued its Decision Following Appeals Board Decision. The protestants filed a timely notice of appeal. In their appeal, protestants raise the issue that the decision of the Department adds nothing new to a solution of the problem, and therefore, has ignored the problem of late night parking noise and congestion.

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<sup>2</sup>California Code of Regulations, title 4, §61.4.

## DISCUSSION

In issuing the original decision, the Appeals Board was faced with the reality of commercial enterprises which are necessary for the type of civilization of city type dwelling of which protestants are a part, but which if expanded by obvious demand beyond a reasonable protection of nearby residents, facilitates the current problem of possible impairment of residential quiet enjoyment. The balancing of the rights to quiet enjoyment and needed commercial enterprise, is difficult and open to obvious subjective posturing. We can only observe that residents in a tract of homes have a greater expectation of quiet enjoyment than residents near a commercial area, notwithstanding the commercial functions enter the scene after the residents have been in the area for some time – a zoning problem. Also, we note that the area around the residential homes is a magnet for tourists which are needful of commercial suppliers of goods and services – the area cannot be compared with the tranquil suburban tract. The immediate area in addition to the amenities for tourists, including the restaurants contemplated, and also those restaurants already in existence, has a ferry landing which picks up and delivers many people daily to the area. In a word, the area is not one of tranquility.

Adding to the burden of balancing these contending needs and objectives, another dining establishment, Fleming Prime Steakhouse 1, LLC (AB-7574), has been approved for license by the Department, but is on appeal by protestants to that issuance. The new premises is to be located near the premises under consideration in this matter. The use of the parking spaces in the large parking area will be by both

establishments, which can only create more of an impact on the nearby residents than would be if the present operation was all that was envisioned.<sup>3</sup>

The Department's original Determination of Issues VII addresses the major concern, that of potential interference with nearby residents due to late night patrons arriving, but mainly leaving the premises by way of the parking lot. The determination validly concludes that the conditions imposed while "... [mitigating] most of the potential residential interference with nearby residences, it does not fully establish noninterference as required by Rule 61.4 in order for the license to issue." The original Determination of Issues VIII states that: "A properly conditioned license would not interfere with the quiet enjoyment of nearby residential property ..." and then states: "The critical issue to establish noninterference will be the use and control of the parking lot in the evening hours." It therefore appears that the Department was fully aware that any absence of effective control of the parking lot would be a potential affront to its own Rule 61.4. The Department in its own decision used the very applicable word "critical" to define the potential for harm to nearby residents.

Apparently, the original Determination VIII was meant to be resolved by that portion of the original condition 18 concerning the security guard mandated in the Order that then followed. This Board held otherwise, stating:

"... the solution offered by the Department to the problem of late night and early morning car and people noise of patrons leaving the premises, say from 10:00 p.m. to 1:00 a.m., and later, and in a state of 'feeling good,' was to provide one security guard to patrol the parking area adjacent to the premises. There are no

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<sup>3</sup>The number of parking spaces is estimated at 255, and with such numbers suggests a problem of noise control, compounded by the addition of another restaurant operation in close proximity to the premises under consideration in this review.

findings to support the proposition that the one security guard could possibly be a solution to the 'critical' problem of late night and early morning parking lot noise. There is no substantial evidence that would support this necessary but 'absent' finding. The imposition of one guard is a negligible resolution, a 'token' solution to a very difficult problem. Such solution is wholly inadequate and contrary to the intent and meaning under the Department's own Rule 61.4."

The above criticism of the Department's attempts to resolve the problem held "critical" by the Department itself, needs to be restated in the present appeal, for it appears the Department for some unexplained reason, has entered into an exercise of "word shuffling" again, and has totally ignored what the Appeals Board had to state in the original matter.

It appears to the Board that the problem is made "critical" as the Department observed, by late night and early morning closing, which will cascade clientele into the large parking area in the immediate vicinity of the sleeping residents, who in regard to the Department's Rule 61.4, have a greater expectation of protection from unreasonable noise, than does applicant to its hoped-for successful commercial enterprise.

The "critical" problem noted in the original decision of the Appeals Board, will be enhanced by the (potential) approval of another restaurant within the same parameters of later night and early morning movement of people and cars. We are forced to agree with the arguments of the protestants that the Department has added nothing new in seeking a solution to the "critical" problem.

Condition 18 which originally called for one attendant for parking, was modified in the present decision under review, as follows:

"18. [Applicant] shall use perimeter parking spaces abutting the adjacent residential properties as 'overflow parking only' after 9:00 pm every night of

the week. [Applicant] shall post 'Overflow Parking Only after 9 PM' signs on such spaces. [Applicant] shall provide and have present at least one designated security guard to patrol the parking area adjacent to the premises. The guard shall be on duty at least one-half hour before sunset through one-half hour after closing each evening [applicant] is open for business and shall be responsible for enforcing the parking restrictions of this condition and to insure that patrons leaving do not engage in conduct in the parking lot which could disturb residential neighbors."

To this Board, the modified condition is an exercise in wordiness without substance – an inadequate attempt at arriving at a reasonable control of the late evening parking problem. We are appalled at the Department's and appellant's counsel assertions in oral argument before the Appeals Board, that the "Department [has] acted with precision" (referring to the new condition 18) and crafted new conditions with "great specificity," being to us, statements of unfathomable rhetoric.

At the February 3, 2000, rehearing before the Appeals Board, it became apparent that the protestants were not allowed to enter into meaningful negotiations concerning conditions which would tend to alleviate the problems as emphasized in the original decision of the Appeals Board. While the Department is purported to have the necessary experience and skills to craft conditions sufficient to resolve the problems, it is the duty of any governmental agency to listen to, and consider the input of the citizenry. If it be true that the protestants were "shut out" of the discussions and considerations of avenues to alleviate the parking problem, the arguments as contained in the Department's brief are indeed cynical, as it states that protestants made no suggestions as to the problems addressed.

It is not for appellate tribunals to micro-manage governmental agencies such as the Department. However, where the Department, as here, has shown such disregard for its own rules and expertise for some unexplained reason, this appellate tribunal is duty bound to demand that the Department thoughtfully reconsider the range of possible alternatives that can be employed to further the Department's duties under its own rules, such as: (1) meet with protestant representatives to obtain input that may be of assistance to crafting realistic conditions; (2) mandatory valet parking after the hour of, say, 8 p.m., to insure that such diners when leaving in the later hours will be under the control of the valet services; (3) after the midnight hour, causing clientele to remain within the premises for their autos to be brought by the valets; (4) shuttling service from points outside the parameters of the parking lot, for clientele arriving after the hour of, say, 9 p.m.; (5) change the ingress/egress from and to the parking lot; (6) require employees working the later and early morning shifts, to park in areas not close to the areas of the residents; and/or (7) limiting sales and service of alcoholic beverages to earlier evening hours which is more commensurate with a restaurant operation. These suggested changes are from observations made by the Board over the years, having observed clear and meaningful conditions, as well, as the opposite.

#### ORDER

The decision of the Department is reversed and remanded for the purpose of considering further evidence on the issues set forth in this decision along with the

crafting of conditions which will be in the best interest of proper control of the parking and noise problem, within the intent of Rule 61.4, balanced by the realities that there will be ingress and egress of cars in the late evening, and, unfortunately in the early morning hours.<sup>4</sup>

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

CONCURRING OPINION TO FOLLOW

The physical location of the residents makes attainment of total “quiet enjoyment” almost impossible. The immediate area in which protestants live has two rows of town-house dwellings, one set facing a busy street, the other facing San Diego Bay. Those units facing the street have no view, except for a street or parking lot. The parking lot is part of an apartment complex that calls itself a resort Apartment, which infers a transient population, which in itself tends to generate noise.

The structures in the complex are two storied. Their garages do not face the street. They are located on the inside, between two rows of dwellings, which are

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<sup>4</sup>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.

separated by a wide driveway, or alley. Vehicles entering or leaving the complex could result in garage doors (and car doors) being opened and closed at all hours of the day or night. Above the garages at each residence is a deck, of sufficient size for informal dining, lounging, or sunning. Any late night entertaining could certainly be heard throughout the complex (as could guests arriving or departing).

Coronado is a tourist town, and has an interesting demographic makeup. It is a combination of elderly retired citizens, a good number of whom are retired military, and young people, because of the Naval Air Station, which is located at the opposite end of the street on which protestants' homes are situated. Parts of Coronado can be quite noisy, including the area where protestants live. Their complex is near a commercial area with restaurants and retail stores that cater mostly to tourists, who arrive there by car, bus, and ferry boat. The ferry disgorges people at a dock within 300 yards of protestants' homes. Many of the tourists, and residents, and visitors from San Diego and conventioners from the Hotel Del Coronado walk down the walkway that extends from the ferry landing south to the bridge which connects Coronado to the City of San Diego.

San Diego Bay is not always quiet. Its traffic, which can often be heard at the complex involved here, includes aircraft carriers, speedboats, fishing boats, yachts, fast moving boats used by the navy's SEAL teams (which train at the nearby Naval Amphibious Base), other naval vessels, ferries, and various other commercial craft. The air above the complex has lots of traffic, including helicopters, and both jet and conventional aircraft using the Naval Air Station runways nearby, or involved with other naval facilities or operation in the immediate area. Nearby to the west of the premises,

is an area designated as the home port of several aircraft carriers including the nuclear variety, being the largest ships in the navy. All this adds to the noise, movement of people, and variety in the area.

In my opinion, the Department made a mistake in allowing the hours of operation at the premises to extend so late on weekend nights. This premises is a restaurant, in which there happens to be located a bar. It is primarily an eating facility. I believe the hours of operation should have been kept at those which are “standard” for restaurants, not bars. There are lots of bars in Coronado, but only a handful of upscale restaurants – Il Fornaio is one of them. A restriction on hours would have indicated the Department’s intention to keep interference with neighbors to a minimum, and would have shown the applicant’s sincere interest in being a good neighbor. Neither of these were displayed.

All of this boils down to my opinion that the Department appears to have acted in an arbitrary manner, and has not taken the time to listen to the residents, and require adjustments that would minimize the impact of this business on the “tranquility” of nearby homes. Nor has applicant been willing to sit down with the residents, and work in good faith together to solve problems that are inherent in such a close and unusual environment. Finally, protestants have not acted totally in good faith, because they have introduced false issues in an attempt to thwart a good business operation from being a successful part of the city’s attractiveness and its economy.

I believe a continuing dialogue between residents and operators would achieve mutually satisfactory results, add to the restaurant’s profitability, and enhance the community. I believe the Department could achieve its goals by taking the time to act

more realistically, not so bureaucratically, and by actually listening. “Cookie-cutter” solutions to complex problems don’t often work, and they won’t work here.

RAY T. BLAIR, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD