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

BARBARA D. KELLY, et al.
Appellants/Protestants

v.

IL FORNAIO AMERICA CORPORATION
dba Il Fornaio
1333 First Street
Coronado, CA 92118
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7350b

File: 47-340761 Reg: 98044362

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED: FEBRUARY 28, 2001

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[1] which overruled their protests against a person to person/premises to premises transfer of an on-sale general

[1]The Decision Following Appeals Board Decision of the Department, dated August 25, 2000, is set forth in the appendix.

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

Appearances on appeal include appellants Barbara D. Kelly, et al., appearing through their counsel, Gerald Cardinale; 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

On March 17, 1998, applicant filed an application 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 were many residents living within 100 feet of the parking lot. The conditions imposed a limitation on the premises' operation as follows: (1) (sale of alcoholic beverages) these conditions are not applicable in this present appeal; (2) (Interior Considerations) these conditions are not applicable in this present appeal; and (3) (Exterior Considerations) adequate parking lot lighting, no loitering, control of litter and trash disposal, and interior and exterior noise not be audible beyond areas under the control of applicant.

The Department denied the issuance of the license on August 6, 1998. An administrative hearing was held on November 3, 1998. Subsequently to the hearing, the Department issued its decision (first decision) on December 11, 1998, which determined that the transfer should not be granted, and that the protests in opposition

to the transfer were sustained. The Department listed the grounds for denial of the transfer as close proximity to residents, undue concentration of licenses, and traffic problems.

On December 21, 1998, applicant filed a request for reconsideration of the first decision, which was granted with the Department reversing its position as found in the first decision, and issuing its decision (second decision) granting the transfer. Protestants filed their appeal. The Appeals Board issued its decision on July 29, 1999, essentially affirming the decision of the Department, but reversing that portion of the decision concerning the parking problems.

On August 17, 1999, the Department issued its Decision following Appeals Board Decision (third decision) adding three conditions to the license if issued. Protestants filed their appeal. The matter was heard by the Appeals Board on February 3, 2000, and a decision issued on March 31, 2000, reversing the Department's third decision, stating:

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

The Appeals Board in its decision also set forth statements from the Department's prior decisions in the present matter: "The determinations (of the Department) validly conclude 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 Appeals Board's decision then cited other portions of the Department's decision: "'A

properly conditioned license would not interfere with the quiet enjoyment of nearby residential property ...' and then states [quoting the Department's decision]: 'The critical issue to establish noninterference will be the use and control of the parking lot in the evening hours.'"

The Appeals Board then criticized the Department's lethargic attempts to exercise its mandated duties under its own rules: "... 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 (first appeal).

The Appeals Board observed that: "To this Board, the modified condition [condition 18] 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."

The Department issued its Decision Following appeals Board Decision dated August 25, 2000 (fourth decision), stating it was adding seven more conditions.

Protestants thereafter filed their appeal in which they raise the following issues: (1) there is an undue concentration of licenses in the area, (2) the interim license should be revoked, and (3) additional conditions are necessary to alleviate the potential for excessive noise from the parking lot areas. The conditions will be addressed together.

DISCUSSION

Protestants contend that there is an undue concentration of licenses in the area. This matter is not properly before us. In our first decision, we concluded that the finding of undue concentration by the administrative judge was erroneous. We affirmed that portion of the Department's second decision. We cannot reconsider that portion of the decision.

We also conclude that we are without jurisdiction to rule in any manner, concerning the issuance of an interim license.

However, it appears to us that the Department's fourth decision has little to do with protecting the nearby residents under the Department's own rules which mandate it use its powers to protect the quiet enjoyment of nearby residents. The Department's decision is nothing more than an exercise in "wordy nothingness." This is from our reading of our decisions and the "responsive " decisions of the Department.

But even within this unexplainable conduct of the Department, there is some light focused on the issue. The case Cardinale v. Flemings Prime Steakhouse I, LLC (2001) AB-7574, concerned an applied-for license next door to the premises under consideration in this review, which restaurant if opened, would share the parking lot with the concerned applicant in this review, and together, could create unacceptable noise and commotion. The Department granted that license (to Fleming) provided it accepted conditions, apparently in addition to the same conditions imposed on applicant in the present appeal. The decision deleted a condition 17 which was noted as unnecessary and unenforceable, being a condition stating that noise was not to be audible beyond

the area under the control of applicant.[2] However, the conditions also set forth a realistic condition 19 which provided that valet service be provided to its patrons, as that there would be "No self-parking ... permitted after 8:30 p.m." apparently mandating valet parking after the hour of 8:30 p.m.[3]

We cannot fathom how the Department could even hope to control this "critical," "parking problem," in the words of the Department, with this present applicant free of that mandatory valet parking condition, a reasonable control, but imposed on its neighbor, both sharing the same parking lot. While Fleming will not be housed, now, next to applicant, the problem still remains, as well as a specter of a questionable double standard used by the Department. It is not unlikely that a new licensee, in time, will find the location worthy of its consideration.

As we noted in our first decision, this is an environmental problem, where no one will be satisfied completely. However, the Department's mandated rule would demand that all realistic controls be crafted in some significant measure, to control as much as possible, the noise that will be nightly present. Without such controls, the Department has failed in its attempt to adhere to its own Rule 61.4. We cannot micro-manage the Department, but we will call the attention of the Department to its inconsistence in its dealings with the two applicants, with to one a realistic approach, and in the present matter, one devoid of consistency and good-faith.

ORDER

---

[2]This same condition is still imposed on the presently concerned applicant, even though it is meaningless, as the Department has stated.

[3]The Fleming matter was dismissed by the Appeals Board as Fleming withdrew their application to be licensed, for some unexplained reason.

The decision of the Department is reversed.[4]

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

---

[4]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.