ISSUED DECEMBER 27, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BALWINDER S. GILL, DALJIT KAUR, RACHHPAL KAUR, JASPAL SINGH and RACHHPAL SINGH dba Bechelli Lane Market 3408 Bechelli Lane Redding, CA 96002, Appellants/Applicants,	)	AB-7360
	)	File: 20-342833
	)	Reg: 98044825
	)	Administrative Law Judge at the Dept. Hearing: Michael B. Dorais
v.	)	
DANIEL BRANNON, et al., Respondents/Protestants,	)	Date and Place of the Appeals Board Hearing: November 18, 1999 San Francisco, CA
and	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

Balwinder S. Gill, Daljit Kaur, Rachhpal Kaur, Jaspal Singh, and Rachhpal Singh, doing business as Bechelli Lane Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application for

[1]The decision of the Department, dated February 23, 1999, is set forth in the appendix.

an off-sale beer and wine license on the ground its issuance as conditioned would tend to cause a return of problems associated with public intoxication, noise, litter, vandalism, graffiti, burglary, traffic congestion and accidents, and would interfere with the quiet enjoyment of nearby residents.

Appearances on appeal include applicants Balwinder S. Gill, Daljit Kaur, Rachhpal Kaur, Jaspal Singh, and Rachhpal Singh, appearing through their counsel, Joshua Kaplan; protestants Daniel R. Brannon, M.D., and Norma J. Brannon, appearing through their counsel, Stephen H. Baker; additional protestants M.F. Cone, Jack D. Freitag, Don L. Funk for Marvin Mahowald, Comine Moats, R.M. Moats, Frank Rook, Isabel Rook, Debra Schnell, Robert Schnell, Garland E. Smith, Keith L. Walton; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants initially applied for a person to person and premises to premises transfer of an off-sale beer and wine license on or about May 19, 1998. On or about August 20, 1998, appellants petitioned for the issuance of a conditional license. The petition (Exhibit 2) recited that the spouse of one of the applicants, presently residing in India, would not participate in the operation of the business; that the proposed premises and/or parking lot are located within 100 feet of five residences; that issuance of the applied-for license without the below-described conditions would interfere with the quiet enjoyment of the property of nearby residents and constitute ground for the denial of the application under Rule 61.4;

and that issuance of an unrestricted license would be contrary to welfare and morals. The petition then set forth only three conditions, all relating to the exclusion of the spouse residing in India. Despite the express reference to Rule 61.4, the petition contained none of the standard conditions normally found in licenses with Rule 61.4 implications. Such conditions include restrictions on size, quantity and type of alcoholic beverage, hours of operation, and noise controls, to name only a few.

Appellants were notified on or about October 1, 1998, that their application was denied. Accompanying the Notice of Denial of Application was a Statement of Issues, reciting that issuance of the applied-for license would be contrary to public welfare and morals, citing article XX, §22 of the California Constitution, Business and Professions Code §23958, and Chapter 1, Title 4, Rule 61.4 of the California Administrative Code. The Statement of Issues also listed five street addresses representing residences said to be located within 100 feet of the proposed premises and/or its parking lot.[2]

An administrative hearing was held on January 12, 1999, at which time oral and documentary evidence was received. At that hearing, Department investigator Jerry Berenger testified that 20 verified protests against the license were received by the Department. The protests raised law enforcement,[3] undue concentration,

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[2] This information is derived from copies of the application documents which are part of the record transmitted to the Appeals Board by the Department.

[3] Berenger cited, as examples of law enforcement problems, transients, graffiti, vandalism, litter, fights, loud noise, traffic congestion, accidents, and public nuisance [RT 24]. He further testified that, based upon his review of police department records, the number of these incidents dropped following the closure of

and Rule 61.4 (residential quiet enjoyment) issues.

Berenger testified that he was able to resolve the issues other than the Rule 61.4 issue. He spoke to the Redding Police Department and was advised it did not object to the license issuing. The City of Redding provided a letter stating issuance of a license would convenience the public, resolving the undue concentration issue under Business and Professions Code §23958.4.

With respect to the Rule 61.4 issue, Berenger testified that he concluded there that there would likely be some interference with the quiet enjoyment of the neighbors in the area, so contacted applicant Gill, and requested a "non-interference letter" in which the applicant was to indicate how he would not interfere with the quiet enjoyment of residents within 100 feet of the premises. Gill provided such a letter (Exhibit 4), in which he stated:

> "We are a small, family owned business that cares about the community. We also live in a very close proximity to our store. We care about the people and their needs both within the store and outside of the store. It is important that ABC and the community understand our intent for business because we desire to bring good to the community. Our hours are not 24 hours - we are open Monday through Friday from 6:00 a.m. - 11:00 p.m. and on Sunday we are open from 7:00 a.m. to 10:00 p.m. These hours are set for customer convenience & are closed during the evening to maintain peace and quiet to not interfere with family lifestyles. We commit to keeping our store clean inside and out and not to add anything that will disturb our community such as live music or improper lighting etc. We will enhance the community, not interfere with it. This is important to our own family as well. Should you have any questions as to our operation, please do not hesitate to contact me."

Berenger further testified that he discussed with Gill the subject of conditions

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the 7-Eleven store which had previously occupied the premises, in January, 1998 [RT 26-28].

being placed on the license, but no conditions other than those relating to the spouse in India had been sought. In response to questions from the Administrative Law Judge (ALJ), Berenger said he advised Gill it was common to apply for conditions relating to lighting, hours of operation, outside speakers, and the like, but, as to Gill's response, "I'm not exactly sure that we had an understanding between each other due to the language barrier" [RT 50].

Berenger, cross-examined by counsel for the Brannon protestants, testified Gill had told him his current daily sales were $70, but he would need sales of $400 daily to make ends meet. This led Berenger to conclude that the volume of sales of alcoholic beverages would be substantially greater than the 10 percent Gill had estimated. However, Berenger conceded that Gill also expected to sell more non-alcohol products as a result of having the ability to sell alcoholic beverages.

Myrna Grossman, one of the protestants, testified that the 7-Eleven store operated 24 hours a day and had outside speakers and gas pumps. She recited numerous problems arising during 7-Eleven's tenure, including noise from the outside speakers and from loud conversations involving teenagers, vagrancy, litter, and vehicle accidents. She described the difference between the current operation and the 7-Eleven as "night and day." When asked by appellants' counsel if there was anything the applicants could do in the operation of their store, such as put conditions on the license, that would help her, she replied [RT 59]:

> "I've given that some thought, and Mr. Grossman, I don't think so. ... I'm perfectly happy to have them there – or I could put up with them there without the liquor license, and it wouldn't bother me. But with the liquor

> license it would bother me because I think it adds to the traffic, the vandalism and the general disrepute of the neighborhood."

Steven Birmingham, called as a witness by appellants, testified that he lived at 3410 Bechelli, directly behind the applicant's store, for approximately four years, during the period Southland operated it, and now lives in the neighborhood where Bonnyview Market, another store operated by appellants and licensed to sell alcoholic beverages, is located. In his opinion, the way appellants operate the store would not harm the quiet enjoyment of the other residents in the neighborhood.

On cross examination, Birmingham disclosed that he moved from the Bechelli address in 1984, and during the time he lived there did not see any vagrants, and had only a minor amount of problems with litter or trash. He very seldom experienced any sort of interference with the quiet enjoyment of his property while he lived there.

Beverly Flynn, also called by appellants, testified that she sold the Bonnyview Market to appellants in 1995, after operating it for three years. That neighborhood remains as quiet as when she owned the store.

Gary Winterburn testified that a mini-mart that does not sell gasoline will generate less traffic than one which does. Winterburn acknowledged that he is the prospective transferor of the license in question, but insisted that the license has increased in value during the pendency of the transfer application, so would stand to benefit if the application is denied.

Don Clearwater, a business broker, opined that gasoline sales account for 50

to 70 percent of the total sales of a mini mart. Clearwater had no opinion on the extent to which sales of alcohol increase traffic.

Shirley Walton, who lives at 3410 Bechelli Lane, directly behind appellants' store, testified that she filed a protest and signed a petition at a time she and her husband were under the impression the 7-Eleven was "reopening all night" [RT 84]. She changed her mind upon learning it would not be 7-Eleven, and

summarized comments in a letter she had written, stating that the store was a positive influence in the area, had considerably cleaned up the neighborhood, was tidy and convenient, and not a concern to her as a mother of five children. Walton acknowledged she had moved to her president residence in June, 1998, and had not lived near the store when it was operated by 7-Eleven. Walton said her thinking would be the same if, as the ALJ suggested could be the case,[4] the store

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[4] The following interchange [at RT 91-92] took place during Walton's testimony:

> "HEARING OFFICER DORAIS: Let me just clarify something with the Investigator ... If the license were approved as proposed, the alcoholic beverages could be sold until 2:00 a.m. and the store could be operated 24 hours a day, or is there anything within the petition for conditional license which would limit either of those two facets of the business operation? For example, does the Form 257 ... operate by law as a condition on the license just because it contains a proposed plan of operation ...
>
> MR. BERENGER: No, sir.
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> HEARING OFFICER DORAIS: Then it could operate 24-hours a day like the 7-Eleven did, and it could sell alcoholic beverage [sic], beer and wine that is, until 2:00 a.m.?

could operate 24 hours a day and could sell beer and wine until 2:00 a.m.

Gill testified that he had invested $300,000 in the store, and without a license to sell alcoholic beverages, was not able to pay bills. The business is run by three brothers, one of whom has taken a job driving a truck to help pay bills. Gill is of the opinion that sales of non-alcohol items would be almost double the sales of alcoholic beverages, because when people buy alcohol they buy other things as well. He would have no objection to a condition that restricted alcoholic beverage sales to 11:00 p.m. in the winter or 10:00 in the summer, because he does not want to stay open after 10:00.

Gill describes his store as a family store, as contrasted with 7-Eleven, a company business. He has different hours, and does not sell gasoline,

His Bonnyview Market store hours are 6:00 a.m. to 10:00 p.m. Its sales of alcoholic beverages constitute 25 percent of all sales. He believes he estimated that the Bechelli Market would realize 10 percent of its volume though the sale of beer and wine from the fact that 15 of the 25 percent of alcohol sales of the Bonnyview market are from hard liquor.

On cross-examination, Gill stated that, while he would agree to a condition limiting his hours of operation, he would not agree to conditions which would prohibit him from selling single cans of beer, or fortified wines, such as Thunderbird and Night Train Express. Further, he would agree to the imposition of conditions which would prohibit loitering in front of the premises, lighting which would

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MR. BERENGER: Yes, sir."

interfere with residents, or video games, but, after conferring with his counsel, stated he would not agree to a condition prohibiting him from exchanging his license for one which would permit the sale of distilled spirits. In response to a question from counsel for the Brannon protestants, Gill said it was his intention to later seek an amendment to the license to permit the sale of hard liquor [RT 109-110], but then indicated he may not have understood what he was being asked. Later in the hearing, Gill was recalled, and testified that he had a conversation with his brother, and now would be willing to accept a condition barring him from seeking the ability to sell hard liquor.

Following Gill's testimony, counsel for the Brannon protestants called a number of witnesses who testified about problems associated with public drunkenness, vandalism, littering, loitering, noise, blocking of driveways, graffiti, teenage drinking and the like which they had encountered during 7-Eleven's operation of the store. One witness, Debra Schnell, said that "single cans" was a big issue: "We had several people in the neighborhood, and I cannot give you their names, but I know them on sight who at that time made five or six trips a day to 7-Eleven for one bottle or one can of beer." The protestant-witnesses, as a whole, were strongly of the view that issuance of the license would bring a return of the problems that essentially vanished when the 7-Eleven store closed.

Subsequent to the hearing, the Department issued its decision denying the application.

Appellants thereafter filed a timely notice of appeal. In their appeal,

appellants raise the following issues: The Department's processing of the application was deficient. Appellants' counsel was incompetent, in that he never formulated, discussed, or presented conditions to limit appellants' operation so that it would not interfere with the quiet enjoyment of nearby residents. The matter should be remanded so that evidence of appellants' willingness to accept such conditions could be presented

. DISCUSSION

I

We have summarized a large portion of the testimony for the purpose of demonstrating, contrary to the implication in the issues raised by appellants in their appeal, that appellants were given ample opportunity in the course of proceedings to state one way or another their position with respect to the imposition on any license which might issue of conditions intended to safeguard the quiet enjoyment of nearby residents.

Appellant Gill, although equivocal on whether he would agree to a condition which would preclude any upgrading of a beer and wine license to one which would permit him to market spirits, was clear in his opposition to conditions limiting the sale of single containers, and the sale of fortified wines.

Given the extensive testimony from numerous witnesses regarding public drunkenness, loitering and littering, and problems with teenage drinking and noise, it is difficult to imagine conditions which could be more essential to the preservation, to the extent possible, of neighborhood quiet enjoyment, if a license

were to issue.

And, despite appellants' claim on appeal that their counsel was incompetent in not pursuing the subject of possible conditions with the Department, it appears that a principal reason for the denial was appellants' unwillingness to accept, when accorded a fair opportunity, license conditions routinely required by the Department in Rule 61.4 situations.

In short, appellant Gill was willing to accept only conditions which would not limit his choices when it came to the alcoholic beverages he wished to sell. In the circumstances of this case, and given the history of the prior seller, it is understandable why the ALJ, and the Department, felt compelled to deny the license.

As the Department observed in its decision, the United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471 [100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263]; Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 244049 L.Ed.2d 310]; Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].)

The Alcoholic Beverage Control Act sets forth the proposition that the Department may make and prescribe reasonable rules as are necessary to carry out the purposes of the Act (Business and Professions Code §25750). One such rule promulgated by the Department is Rule 61.4 (4 Cal.Code Regs. §61.4), which reads, in pertinent part:

> "No original issuance of a retail license or premises to premises transfer of a retail license shall be approved for premises at which either of the following conditions exist:
>
> (a) The premises are located within 100 feet of a residence.
>
> (b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. ..."

Over the years, the Board has visited the extremely restrictive requirements of Rule 61.4 on numerous occasions. In Davidson v. Night Town, Inc. (1992) AB-6154, the Board stated: "In rule 61.4, the department prohibits itself, as it were, from issuing a retail license if a residence is within 100 feet of a proposed premises. ..." In Ahn v. Notricia (1993) AB-6281, the Board said:

> "This rule [Rule61.4] concerns prospective interference or non-interference with nearby residents' quiet enjoyment of their property. ... Apparently rule 61.4 is based upon an implied presumption that a retail alcohol operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment."

In Graham (1998) AB-6936, the Board, referring to numerous cases invoking the rule, described the rule as "nearly absolute."

Of course, the rule is not absolute, since it permits the issuance of a license even though there may be residences within 100 feet if, and only if, the applicant "establishes that the operation of the business will not interfere with the quiet enjoyment of their property by residents." Thus, once the proximity between residence and business is shown to be less than 100 feet, the burden shifts to the applicant to demonstrate that the operation of the business will not interfere with residential quiet enjoyment.

When Gill expressed his unwillingness to agree to conditions which would have limited the sale of single cans of beer (the usual such condition extends to malt beverages of all types, including malt beverage coolers) and fortified wines, he effectively doomed any chance he may have had for the issuance of the license, given the adamant opposition and concern of so many nearby residents, both within and beyond the 100-foot measure of Rule 61.4, and the sordid history of his predecessor in the proposed location involving problems of the kind commonly found to be connected to the sale of those types and sizes of alcoholic beverages, such as, for example, loitering, litter, and public intoxication.

The record also refutes appellants' claim that the decision is not supported by the findings and the findings 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 [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].)

When, as in the instant 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].)

Appellate review does not "resolve conflicts in the evidence, or between

inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

The Department was entitled to rely upon the sworn testimony provided by a number of witnesses about circumstances that would threaten their recently regained quiet enjoyment of their neighborhood. It is clear from the record that the location in question has a history of problems when it is a source of alcoholic beverages. The Department, with its broad experience and equally broad discretion, was justified in its action in denying the license. To characterize its handling of the application as deficient and inept, as applicants have, is simply unjustified.

II

Appellants claim they were denied due process as a result of having been represented by incompetent counsel. The incompetency, according to appellants, is his alleged failure to formulate, discuss, or present any set of conditions to limit the parameters of appellants' operation so as not to interfere with residential quiet enjoyment.

The alleged incompetency of counsel as a ground for relief in civil cases is an appellate tactic that has received little acceptance.

Even the case most relied upon by appellants, Vartanian v. Croll (1953) 117 Cal.App.2d 639 [256 P.2d 1022, 1026], demonstrates this:

> "It is a general rule that a client is chargeable with the negligence of his attorney, and that his redress, if any, is against that attorney. The mere fact that an attorney does not make a skillful presentation of a client's case, will

not, standing alone, usually warrant relief ... ."

Although Vartanian v. Croll acknowledges that there are exceptions to that general rule, this case is certainly not one.

The principal contention that appellants make is that their attorney at the hearing failed to present evidence of conditions which could be placed on the license they sought so that it would not interfere with the quiet enjoyment of the community.

Yet, the transcript demonstrates beyond cavil that the subject of possible conditions was explored at some length. (See RT 113-118.)

Interestingly, the conditions itemized in appellants' brief (at pages 15-16), as those competent counsel would have proposed, do not include what in the Board's experience are two of the most important conditions ordinarily imposed upon a license by the Department when neighborhood tranquility is a concern, those being the single container limitation and the ban on the sale of fortified wines. Perhaps as much as anything else, these two conditions contribute to the control of litter, loitering, drinking in public, and public intoxication in the area proximate to an off-sale licensed premises.

We can only assume that the reason appellants did not list these two conditions with the others they say competent counsel would have suggested is the fact that they had already been suggested to appellants, and by them rejected.

Appellants' claim that their hearing counsel was incompetent is little more than an exercise in 20/20 hindsight, but their views on this issue reflect a mistaken

assessment of the hearing record. Their attorney at the administrative hearing may have avoided bringing up the subject of conditions because, for all the record shows, he knew the most critical of the conditions would be unacceptable to his clients. Since this is the only area where there has been any claim of inadequate representation, the contention must be rejected.

ORDER

The decision of the Department is affirmed.[5]

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

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[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.