

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

AB-7398

WATERFRONT ENTERPRISES, INC. dba Newport Landing Restaurant
503 East Edgewater, Newport Beach, CA 92661,
Appellant/Licensee

v.

LESLIE HARRISON et al.,
Respondents/Protestants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 47/58-331567 Reg: 98044363

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 4, 2003

Waterfront Enterprises, Inc., doing business as Newport Landing Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which conditionally overruled protests against, and granted, subject to certain conditions, its application for a premises-to-premises transfer of an on-sale general public eating place and caterer's permit license.²

¹The decision of the Department, dated April 15, 1999, is set forth in the appendix.

² The object of the application was to add a non-contiguous outdoor lanai/patio area to an existing on-sale general public eating place and caterer's permit license. Because of the non-contiguous nature of the proposed addition, the Department treated the application as a premises-to-premises transfer instead of as a premises expansion.

Appearances on appeal include appellant Waterfront Enterprises, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr.; protestants Leslie J. Harrison, Patricia Harrison, Gay Kelly, William A. Kelly, Jean A. Schrimmer, Robert S. Schrimmer, Marianne Zippi, and Wayne Zippi, representing themselves; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant operates an up-scale restaurant on Balboa Island in the City of Newport Beach. Appellant has been licensed as an on-sale general public eating place since approximately 1987.³ The application involved in the present appeal appears to have been filed sometime in 1997. A petition for conditional license was filed on or about July 2, 1998. The petition contained seventeen proposed conditions, some of which were in response to a protest filed by the Chief of the Newport Beach Police Department.⁴ The petition also contained the following recitals:

... pursuant to Section 23958 of the Business and Professions Code, the Department may deny an application for a license where issuance would result in or add to an undue concentration of licenses; and

... the proposed premises are located in Census Tract 628 where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business and Professions Code; and

... the petitioner(s) stipulate(s) that by reason of the aforementioned over

³ The existing license is subject to only two conditions, one prohibiting the exchange of the license for a public premises (bar or cocktail lounge) license, and one providing that entertainment provided shall not be audible beyond the area under the control of the licensee.

⁴ The police protest was withdrawn after appellant agreed to the nine conditions proposed in the protest. Those became conditions 2 through 10 on the petition for conditional license.

concentration of licenses, grounds exist for denial of the applied-for license(s); and

... the Newport Beach Police Department has protested the issuance of the applied-for license without the below listed conditions, and the aforementioned protest is based on Section 23958.4 and the proposed operation of the applied-for premises; and

... the proposed premises is located within the immediate vicinity of a residential area; and

... issuance of an unrestricted license without the below-described conditions may interfere with the above-mentioned residences; and

... including second floor patio and a sidewalk dining area as a portion of the licensed premises without conditions to adequately oversee and monitor the activity on or about said areas would be contrary to public welfare and morals.

The licensing investigator of the Department recommended that the petition be denied, concluding that the proposed premises would interfere with the quiet enjoyment of the residential property of residents in the area.

An administrative hearing on appellant's petition for conditional license was held on January 13 and 14, 1999, at which time extensive testimony was presented both in support of and against the application. The issues addressed at the hearing were described by the Administrative Law Judge (ALJ):

The issues to be determined in the remaining protests are whether approval of the requested license transfer to the proposed location would be contrary to public welfare or morals in that (1) normal operation of the business with the license sought would interfere with the quiet enjoyment of nearby residents (increased parking difficulties, traffic, noise and past insensitivity to neighbors), (2) operation of the business with the license sought would create a law enforcement problem for the City of Newport Beach [hereinafter "City"], (3) part of the area proposed to be licensed is not zoned to permit such a business, (4) issuance of the license sought will result in an undue concentration of on-sale licenses due to its location in a "high crime" area, and/or (5) part of the premises proposed to be licensed is located adjacent to a commercial "fun zone" and would impermissibly expose children to consumption of alcoholic beverages. Subsequent to the hearing, the Department issued its decision which sustained

the protests only on the issue of residential quiet enjoyment under Department Rule

61.4 (4 Cal. Code Regs., section 61.4).⁵ The decision includes findings that it was not established that operation of the business would create or add to a law enforcement problem for the Newport Beach Police Department; that issuance of the license would impact an undue concentration of on-sale licenses; that no evidence was presented to establish that selling and serving alcoholic beverages outdoors near amusement attractions used by underage individuals is harmful in any respect; that not all of the noise, trash pollution, and rowdy pedestrians claimed by protestants have as their source the Newport Landing Restaurant; and that the existing traffic congestion in the area will not be significantly worsened by the addition of alcoholic beverages to the outdoor dining area.

The decision, which contains an extensive analysis of the issues and the evidence, provided that, if appellant accepted revisions in the conditions set forth in the petition, as well as three additional conditions set forth in the proposed decision, the protests would be overruled and the license granted. The revisions to the conditions contained in the petition for conditional license, and the new conditions added by the ALJ, are set forth in an addendum hereto.

Appellant has filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the findings do not support the addition of further conditions; and (2) no evidence was elicited at the hearing to substantiate additional conditions.

DISCUSSION

The Department may impose “reasonable conditions” on a license under the

⁵ Rule 61.4 precludes the Department from issuing a license where the proposed premises or its parking lot is located within 100 feet of a residence, unless applicant can demonstrate that operation of the business will not interfere with the quiet enjoyment of the property by residents.

authority of Business and Professions Code section 23800, subdivision (a), which provides that "If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions" the Department may grant the license subject to those conditions. Section 23801 states that the conditions "may cover any matter . . . which will protect the public welfare and morals"

The Board views the word "reasonable" as set forth in section 23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a reasonable connection between the problem that needs to be eliminated and the condition designed to eliminate the problem.

When the Department's findings are attacked on the ground of 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 adequate support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456].) It "is not synonymous with 'any' evidence, but is evidence which is of ponderable legal significance," and must be 'reasonable in nature, credible, and of solid value' [Citations.]

Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872

[269 Cal.Rptr. 647].)

Appellant's challenge to the decision is premised on its contention that the Administrative Law Judge (ALJ) failed to explain why any of the modifications or additional conditions were necessary in order for the license to issue. They contend that, although he acknowledged that the conditions contained in the petition for conditional license "go a great distance" in establishing that operation of the business would not interfere with the enjoyment of their property by nearby residents, including those whose residences are within 100 feet of the premises or its parking facility, he did not include any analysis as to why modifications or additional conditions were necessary. Appellant stresses the fact that the premises had operated responsibly and free of discipline for the preceding twelve years with only two conditions, and argues that the conditions originally proposed in the petition for conditional license are sufficient to protect nearby residents.

Contrary to appellant's contention, the ALJ did explain why he thought additional protections were necessary, albeit not in as much detail as appellant would prefer:

The Exhibit 3 [the petition for conditional license] conditions by themselves offer significantly more protection to nearby residents than do the conditions currently in force. In particular, the hours limitations, both as to the patio/lanai area and as to the interior of the proposed premises, should ensure that no late night or early morning disturbances in the neighborhood are attributable to the Newport Landing Restaurant. However, to ensure full enjoyment of nearby residences, modifications to some Exhibit 3 conditions and addition of other conditions is essential.

Except in minor respects, which we shall address, we cannot say that the balance he struck was unreasonable or arbitrary. Except for his amendment of

conditions 4,⁶ 9, and 14, and his addition of conditions 19 and 20, the amended conditions and newly-added conditions appear to be reasonably related to the perceived problem - the protection of nearby residents.

Appellant suggests that the ALJ, through his use of the phrase “fully ensure quiet enjoyment” used a standard higher than required under Rule 61.4. We do not agree. In context, we think he was saying only that, as they stood, the Exhibit 3 conditions did not adequately protect nearby residents. In any event, we do not see how any of the modifications or additions, except as noted, went beyond what would be reasonable under Rule 61.4, as we shall demonstrate.

Condition 9, as originally proposed, prohibited any permanent bar or service bar on the outside dining area. The amendment to condition 9 prohibits any bar fixture of any kind or type, and would preclude the use of a temporary bar. The ALJ did not explain why this would be necessary for the protection of residential quiet enjoyment, and it is not immediately apparent to us how it might be. Since we are remanding this case to the Department for reconsideration, he will have an opportunity to explain his action in expanding the original scope of this condition.

Condition 13, as originally proposed, provided that entertainment provided in the interior of the premises not be audible beyond thirty feet from the premises. As revised, entertainment must not be audible outside the premises building when the entry door is not open for emergency or patron and staff use. It is obvious that control of noise is a major consideration in protection the quiet enjoyment of nearby residents. Appellant

⁶ The amendment to condition 4 appears to be little more than a clarification where signs should be posted, alerting patio patrons not to take alcoholic beverages onto the public walkway.

has not suggested that it is incapable of complying with the condition as modified, and it is reasonably related to the perceived problem, so we cannot say its modification was an abuse of discretion.

As originally proposed, condition 14 required live entertainment to cease at 12:00 midnight each day of the week. As revised, live entertainment must cease at 10:00 p.m. except on Friday and Saturday nights, when it may continue until 12:00 midnight. We have difficulty understanding the logic of this requirement, especially in light of the fact that, under condition 13, noise from entertainment is to be confined to the interior of the premises, and under condition 1, sales, service, and consumption of alcohol in the interior of the premises may continue until midnight on week days and until 1:00 a.m. on Saturdays and Sundays. Again, on remand, the Department should explain, if it can, why the modification is essential to the protection of quiet enjoyment in light of conditions 1 and 13.

Without any input from appellant as to its impact, we do not see the modification of condition 16 as of any particular significance. The modification expands upon the word "emptied" to include both dumping and picking up of trash, and moves from 11:00 p.m. to 10:00 p.m. the evening cut-off on emptying trash. Since the object of a limitation on trash emptying is to abate noise during otherwise quiet hours, we think it reasonable to clarify the condition to embrace all noise-making activities associated with the task of managing trash.

Newly-added condition 19 denies to appellant the exercise of any off-sale privileges that appellant would possess by virtue of the type of license involved. The decision does not explain how this restriction relates to quiet enjoyment, and we are not inclined to guess at what may have been in the mind of the ALJ. Again, the

Department will have the opportunity on remand to make a case, if it can, for this restriction.

Newly-added condition 20 restricts appellant from installing outdoor lighting to illuminate the outdoor dining area. The ALJ did not explain how the presence of outdoor illumination would affect residential quiet enjoyment, and appellant has not told us how its absence will impact its proposed operation of the outdoor patio. However, since sales of alcoholic beverages are permitted until 10:00 p.m., it would seem reasonable to permit some kind of lighting on the patio during that period, if, for no other reason, to assist the servers in ensuring that the patio patrons are old enough to purchase alcoholic beverages.

Newly-added condition 21 does no more than continue in force the condition on the original license which prohibited its exchange for a public premises, or bar, license. Appellant has not singled this condition out for discussing, its complaint about the new or modified conditions having been couched in general terms.

Except where we have made specific comment critical of a condition, we are satisfied that a case can be and has been made for the new conditions and modifications of the proposed conditions in the decision of the Department. Where residential quiet enjoyment is a focus of concern, any doubt should be resolved in its favor.

ORDER

The case is remanded to the Department for reconsideration of conditions 9, 14, 19, and 20, in light of our comments herein. Except in those respects, the decision of

the Department is affirmed.⁷

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

⁷ 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.

ADDENDUM

"AGREED" CONDITIONS AND CHANGES AND ADDITIONS TO CONDITIONS⁸

Condition No. 1: Except on the sidewalk dining area, sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 7:00 a.m. and 12:00 a., (midnight) on Monday through Friday, and until 1:00 a.m. on Saturday and Sunday.

Condition No. 2: Sales, service and consumption of alcoholic beverages on the sidewalk dining area shall be permitted only between the hours of 11:00 a.m. and 10:00 p.m. on Monday through Friday, and 9:00 a.m. and 10:00 p.m. on Saturday and Sunday.

Condition No. 3: A sign shall be posted directly inside the main entrance of the Newport Landing Restaurant, as depicted on the attached ABC-257 dated 5/20/97, which shall state, "NO ALCOHOLIC BEVERAGES BEYOND THIS POINT - WAITER/WAITRESS SERVICE ONLY." Said sign shall measure no less than 7"X11", and contain lettering no less than one inch in height.

Condition No. 4: A sign shall be posted directly inside all exits to the sidewalk dining area as indicated on the attached ABC-257 dated 5/20/97, which shall state, "NO ALCOHOLIC BEVERAGES BEYOND THIS POINT - WAITER/WAITRESS SERVICE ONLY." Said sign shall measure no less than 7" X 11", and contain lettering no less than one inch in height.

As revised: A sign shall be posted directly inside each entrance to and exit from the sidewalk dining area as indicated on the attached ABC-257 dated 5/20/97, which shall state, "NO ALCOHOLIC BEVERAGES BEYOND THIS POINT - WAITER/WAITRESS SERVICE ONLY." Said sign shall measure no less than 7" X 11", and contain lettering no less than one inch in height.

Condition No. 5: Only the licensee(s) or an employee of the licensee(s) shall be permitted to carry alcoholic beverages between the Newport Landing Restaurant interior and the sidewalk dining area.

Condition No. 6: The licensee(s) or an employee of the licensee(s) shall be present in the sidewalk dining area at all times that alcoholic beverages are being served or consumed, to ensure that the Alcoholic Beverage Control Act, State, County or City Ordinances are not violated upon this portion of the licensed premises.

Condition No. 7: At all times when the sidewalk dining area is open for business, the sale of alcoholic beverages shall be made only in conjunction with the sale of food to the person ordering the beverage.

Condition No. 8: There shall be no live entertainment, amplified music or dancing

permitted on the sidewalk dining area at any time.

Condition No. 9: There shall be no permanent bar, or service bar, of any type, on the sidewalk dining area maintained for the purpose of sales, service, or consumption of alcoholic beverages directly to patrons for consumption.

As revised: No bar fixture of any kind or type for the preparation or service of alcoholic beverages shall be maintained on the sidewalk dining area at any time.

Condition No. 10: The sidewalk dining area shall be bordered by open railing measuring at least 42" from ground level; planter boxes shall be permanently affixed to the railing.

Condition No. 11: The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The licensee shall at all times maintain records which reflect separately the gross sales of food and the gross sales of alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.

Condition No. 12: Any time there is live entertainment, all doors and windows shall be kept closed, except in case of emergency or actual entry or exit of patrons. Said doors and windows not to consist solely of a screen door or ventilated security doors and windows.

Condition No. 13: Entertainment provided in the interior of the premises shall not be heard beyond thirty (30) feet from the interior of the premises in any direction.

As modified: Entertainment provided in the interior of the premises shall not be audible outside the premises building at any time when the entry door to the premises is not open for emergency purposes or to permit the entry or exit of patrons or staff of the licensee.

Condition No. 14: Any live entertainment shall cease at 12:00 midnight each day of the week.

As modified: Live entertainment shall not be permitted after 10:00 p.m. on Sunday through Thursday nights or after 12:00 midnight on Friday and Saturday nights.

Condition No. 15: Petitioner(s) shall not require an admission charge or cover charge, nor shall there be a requirement to purchase a minimum number of drinks.

Condition No. 16: Trash shall not be emptied between the hours of 11:00 p.m. and 8:00 a.m. each day of the week.

As modified: Trash shall not be emptied between the hours of 10:00 p.m. and 8:00 a.m. each day of the week. The prohibition includes both the dumping and pickup of trash

outside the premises building.

Condition No. 17: No condition was assigned this number.

Condition No. 18: No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee.

Condition No. 19: *Exercise by the licensee of any off-sale privilege (sale of alcoholic beverages "to go" is prohibited at any time.*

Condition No. 20: *The licensee shall not install outdoor lighting to illuminate the sidewalk dining area.*

Condition No. 21: *The subject alcoholic beverage license shall not be exchanged for a public premises type license.*