

ISSUED MAY 8, 2000

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

BRYAN A. FOSTER and TONY	)	AB-7436
HABASH,	)	
Appellants/Protestants,	)	File: 21-343868
	)	Reg: 99045634
v.	)	
	)	Administrative Law Judge
DIANE CAROL DASOVIC	)	at the Dept. Hearing:
dba Hayes & Cole Market	)	Stewart Judson
2111-15 Hayes Street	)	
San Francisco, CA 94117,	)	Date and Place of the
Respondent/Applicant,	)	Appeals Board Hearing:
	)	March 16, 2000
and	)	San Francisco, CA
	)	
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	
Respondent.	)	

Bryan A. Foster and Tony Habash (protestants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which granted the application of Diane Carol Dasovic, dba Hayes & Cole Market, 2111-15 Hayes Street, San Francisco, CA 94117, for the transfer, person to person and premises to premises, of an off-

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<sup>1</sup>The decision of the Department, dated June 10, 1999, is set forth in the appendix.

sale general license.

Appearances on appeal include appellants/protestants Bryan A. Foster and Tony Habash; respondent/applicant, Diane Carol Dasovic; and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

#### FACTS AND PROCEDURAL HISTORY

An administrative hearing was held on March 25, 1999, on the protests of protestants Foster, Habash and others against the granting of an application for a person to person and premises to premises, transfer of an off-sale general license to applicant Dasovic.

The ALJ set out the following issues as those raised by the various protestants: (1) issuance of the license will result in a law enforcement problem due to increased litter, loitering, and panhandling; (2) issuance of the license will result in the violation of the Haight Street Moratorium<sup>2</sup>; (3) the proposed premises will be in the vicinity of a daycare facility, a park, a school, a substance abuse and alcoholic addiction center, churches and halfway homes, and will interfere with their operation; and (4) the proposed premises is in the vicinity of residences, and will interfere with the quiet enjoyment of residents.

The Department's views on the application were described by Department investigator Timothy Simpson. In his 18 years with the Department, Simpson has been involved in numerous instances of protested applications. He testified in place

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<sup>2</sup> This "moratorium is also referred to at various times in the record as the "Haight Ashbury Moratorium."

of Dan Lee, the Department investigator who conducted the actual investigation of the application and recommended the issuance of the license, as conditioned. Lee was recovering from surgery and unable to appear. Diane Carol Dasovic, the applicant, testified in support of her application, and protestants Foster and Habash<sup>3</sup> testified in opposition to the issuance of the license. Subsequent to the hearing, the Department issued its decision which affirmed the investigator's recommendation to grant the application and permit the transfer of the license.

There were originally 24 protests against the issuance of the license, and an additional nine objectors who failed to respond within the required time limits. Seven of those protestants appeared or were represented at the hearing, and two of those seven have now appealed. Protestant Foster has raised the following issues in his brief: (1) the report of the Department's investigator contains a false and insufficient assessment of the neighborhood conditions; (2) the effect that issuance of the license will have on residents and businesses in the neighborhood is in dispute; and (3) false statements were made by the applicant at the hearing. Protestant Habash has not filed a brief.

## DISCUSSION

### I

Protestant Foster claims that the report of the Department's investigator contains a false and insufficient assessment of the neighborhood conditions. He

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<sup>3</sup> Habash is the son of the proprietors of a grocery store across the street from the proposed premises. His testimony reflected, for the most part, his affirmative responses to leading questions asked by Foster.

presents a number of sub-issues in this category, contending that issuance of the license would violate the Department's "maxim" guideline; issuance would violate the Haight-Ashbury Moratorium; the Department misstated the number of small and vagrant crimes and misdemeanors, and ignored the homeless problem of the area; the Department investigator did not succeed in contacting any of the residents within the 100-foot radius of the premises; the Department did not solicit the opinion of the San Francisco public health officer; liquor will be sold to welfare recipients; and, finally, testimony of the investigator with respect to the Board of Supervisors was irrelevant.

The various objections raised oftentimes border on the irrational, absurd, and offensive, and are, for the most part, simply unsupported assertions on the part of protestant Foster. He is the only resident of the 64 residences within 100 feet of the proposed premises to protest the license, and, based upon many of the statements made at the administrative hearing and in his brief, it is apparent that he has a great deal of personal animosity directed against the applicant's father, who owns the building which houses the proposed premises.

The report prepared by the Department investigator is thorough and detailed, and appears to address all important points the Department would be expected to consider.

It is readily apparent that protestant Foster is groping for reasons to object to the license. None of those he presented withstood scrutiny.

We assume that his reference to the Department's "maxim" guideline is

intended to raise the issue of undue concentration of licenses under Business and Professions Code §23958.4. However, the Department's investigative report explained that the San Francisco Board of Supervisors had made a determination that a properly conditioned license would satisfy the requirement of public convenience and necessity. No evidence to the contrary was offered.

The Department's investigative report also cites SFPD Sergeant Porto's advice that the proposed premises is not in a designated high crime area, and that the former premises did not have a history of excessive calls for service. No evidence to the contrary was presented at the hearing.

Similarly, the problems associated with transients and the homeless were considered, and are addressed in the conditions. The claim that liquor will be sold to welfare recipients is speculative and irrelevant; the fact that such is possible could prevent the issuance of almost any license.

While Foster claims the investigator did not contact all the residents within the 100-foot radius of the premises, he lists only four persons, including himself, who he claims were not contacted, and offered no evidence to refute testimony that ABC 205 letters (notification to residents of license application) were sent to all such persons. [RT 62].

No reason has been offered as to why the San Francisco public health officer should have been consulted.

II

Protestant Foster contends that the effect that the issuance of the

license would have on residents in the area is in dispute.

This contention seems to be an attempt to show that residents of the neighborhood, and particularly those within 100 feet of the proposed premises will suffer an interference with their quiet enjoyment, thus invoking the limitations set forth in Department Rule 61.4 (4 Cal. Code Regs. §61.4.) That rule, while prohibiting the issuance of a license where there are residences located within 100 feet of the premises, also provides that a license may issue where the applicant demonstrates that operation of the premises will not interfere with the quiet enjoyment of their residences by those residents.

The ALJ concluded that the operation of the premises will not interfere with the residents' quiet enjoyment of their property. (See Finding of Fact XVI and Determination of Issues IV.) The principal evidence in support of his conclusion consists of the conditions which will be imposed on the license, and the type of operation proposed.

The petition for conditional license recites that the premises is located in an area of undue concentration of off-sale licenses, is located within 100 feet of 64 residents whose quiet enjoyment of their property would be interfered with without the eleven conditions set forth in the petition, and is within 200 to 600 feet from eight consideration points (churches, school, child care and medical facilities), and that its issuance without such conditions would be contrary to welfare and morals.

The eleven conditions are as follows: (1) sales and delivery of alcoholic beverages shall be permitted only between the following hours: Sunday through

Saturday - 9 a.m. to 9 p.m.; (2) no wine shall be sold with an alcoholic beverage content greater than 15% by volume; (3) no wine shall be sold in bottles or containers smaller than 750 ml, and wine coolers shall not be sold in units of less than a four pack; (4) no beer shall be sold, regardless of container size, in quantities of less than six per sale; (5) no malt liquor shall be sold; (6) no alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee; (7) there shall be no exterior advertising of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages; (8) no pay telephone(s) may be maintained on the premises; (9) no video machine(s) may be maintained on the premises; (10) the licensee shall be responsible for maintaining free of litter the area adjacent to the premises over which she has control; and (11) petitioner shall regularly police the area under her control in an effort to prevent the loitering of persons about the premises.

These appear to be the type and kind of restrictions customarily required by the Department when there is a possibility that an unrestricted operation might interfere with the quiet enjoyment of nearby residents.

The report contains the investigator's opinion, which, he says, is shared by the SFPD Permits Officer, that the issue of non-interference with residents was adequately addressed by the fact that the premises has been licensed for many years; the applicant's family has owned the building for 50 years and has maintained its operation free of police problems; applicant has agreed to the

Department's conditions; and the applicant has the approval of the Governing Board.<sup>4</sup>

Applicant intends to operate as a convenience market. The premises is located on the ground floor of a multi-story building located on a secondary street in a mixed commercial and residential district of San Francisco. The previous occupant of the premises, who also operated a grocery, held an off-sale general license from July 1, 1964, to February 9, 1998, with no disciplinary history.

The report of the Department investigator recites that he and the San Francisco Police Department believe that the conditions set forth in the petition adequately address the concerns of the protestants and objectors.

Protestant raises three points: (1) parking will become more difficult; (2) there is no neighborhood concern for lower prices on hard spirits; and (3) applicant has installed an aesthetically-offensive security gate over the entire length of the front of the premises.

There is no evidence in the record one way or another with regard to parking in the area, other than applicant's acknowledgment that she could not offer off-street parking.

The record contains no evidence with regard to applicant's pricing intentions. Protestant Foster has made a number of arguments concerning possible dangers of both high and low prices, but has offered nothing of substance to establish this as

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<sup>4</sup> This refers to the ruling of the Governing Board of San Francisco, Board of Supervisors, that the application would serve public convenience and necessity. See Exhibit 6, unnumbered page 15.

a genuine issue.

Protestant's objections to the security gate raise aesthetic issues that are of little relevance in the decision whether to grant an alcoholic beverage license.

We are satisfied that there is record support for the ALJ's determination on the residential interference issue.

### III

Protestant Foster claims that applicant made false statements during her testimony at the hearing, relating to such subjects as the type of operation contemplated, applicant's dealings with the prior tenant, and his disputes with applicant's father.

Aside from the fact that the ALJ chose to believe the testimony of applicant and the Department investigator, protestant Foster has offered nothing but his own assertions, most of which had little, if anything, to do with the issues.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne

Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261

Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The ALJ felt it necessary to note that Foster had several times “referred in a rebarbative manner to applicant’s ethnic background and what he perceived as her inability to be truthful.” (See Finding XI, footnote 3.) Our review of the transcript satisfies us that the ALJ’s reaction was fully justified.

The decision of the Department is well-supported by its findings, and the findings, in turn, are well supported by the evidence. The Department is vested with considerable discretion in considering a license application. Protestants have failed to show that discretion was abused.

#### ORDER

The decision of the Department is affirmed.<sup>5</sup>

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

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<sup>5</sup> 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.