

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

AB-7716

File: 21-355410 Reg: 00048929

GURMUKH SINGH GOSAL dba Mace Market Grocery Liquor Food
2939 Spafford Street, Suite 100, Davis, CA 95616,
Appellant/Licensee

v.

CLAYTON D. FORD, et al.
Protestants,

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 28, 2001

Gurmukh Singh Gosal, doing business as Mace Market Grocery Liquor Food (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which, while overruling protests against his application for a person-to-person, premises-to-premises transfer of an off-sale general license in the City of Davis, conditioned its issuance upon a limitation of the hours during which alcoholic beverages may be sold.

Appearances on appeal include appellant Gurmukh Singh Gosal, appearing through his counsel, Michael B. Levin; protestants Clayton D. Ford, Linda Ford, Ketty

¹The decision of the Department, dated October 26, 2000, is set forth in the appendix.

Mobed, Matt Nolberg, and Jafar Yaghoobi; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

This is an appeal by Gurmukh Singh Gosal (appellant), an applicant for a person-to-person, premises-to-premises transfer of an off-sale general license for what is described in the record as “an upscale convenience store” in Davis, California. An Interim Retail Permit was issued to appellant, but his store was not yet in operation at the time of the hearing. Appellant had agreed, prior to the hearing, and in response to the concerns of the protestants, to the imposition of fourteen conditions upon the license, covering such things as hours of operation, time of deliveries, container size, litter, graffiti, illumination, signs, consumption on or adjacent to the premises, window signage, pay telephone, loitering, amusement devices, and adult video recordings.

An administrative hearing was held on August 8, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued a decision which determined that issuance of the license would result in increased traffic and noise after 9:00 or 10:00 p.m., following the closure of other businesses in the shopping center where the premises are located, and would thereby interfere with the quiet enjoyment of nearby residents. Concluding that issuance of the license would be contrary to public welfare and morals, the decision sustained the protests and denied the application; however, the decision provided that if the applicant agreed to the addition of a condition limiting sales of alcoholic beverages to the hours of 6:00 a.m to 10:00 p.m. Sunday through Thursday, and 6:00 a.m. to 12:00 midnight on

Friday and Saturday, issuance of the license would not be contrary to welfare and morals, and the protests would be overruled. The petition for conditional license had initially provided for hours of operation not exceeding 6:00 a.m. to 12:00 midnight each day of the week.

Appellant thereafter filed a timely notice of appeal, in which he contends the Department lacked substantial evidence in light of the whole record for its conclusion that the condition limiting hours of sale was essential to the protection of public welfare and morals.

DISCUSSION

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the

² California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

Business & Professions Code §23800 provides, in relevant part:

"The department may place reasonable conditions upon retail licensees or upon any license in the exercise of retail privileges in the following situations:

"(a) 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."

Business and Professions Code §23801 provides:

"The conditions authorized by Section 23800 may cover any matter relating to the privileges to be exercised under the license, the personal qualifications of the licensee, the conduct of the business or the condition of the premises, which will protect the public welfare and morals, including, but not limited to, the following:

"(a) Restrictions as to hours of sale.

"(b) Display of signs.

"(c) Employment of designated persons.

"(d) Types and strengths of alcoholic beverages to be served where such types or strengths are otherwise limited by law.

"(e) In cases under Section 23800(c), the portion of the privileges to be exercised under the license.

"(f) The personal conduct of the licensee."

Thus, any condition the Department would impose must be reasonable, and there must be grounds upon which a license could be denied without the imposition of such a condition. There must be a "reasonable nexus" between the condition and the perceived problem.

As the Department's brief points out, it is clear from the Department's decision that the Administrative Law Judge (ALJ) focused exclusively on residential quiet enjoyment. Our review of the record as a whole leads us to conclude that he lacked

sufficient support for the addition of the condition limiting the hours during which appellant may sell alcoholic beverages.

The evidence in this case disclosed that the proposed premises is located in a small shopping center located in or adjacent to a large commercially-zoned area in close proximity to an extensive residential area, some of which are less than six hundred feet from the proposed premises. At least one resident resides less than 150 feet from the premises. The protestants' residences are separated from the premises by a street, trees, a high wall, and the rear of the proposed premises. The concerns expressed by the protestants were mainly that late night noise and traffic generated by the operation of the premises would disturb those residents nearest the premises.

The Department investigator, on the other hand, was of the view that there was no substantial evidence that issuance of the license would increase traffic in the area. She was relying on an opinion expressed by a civil engineer employed by the Public Works Department of the City of Davis.

Appellant testified that the bulk of his sales of alcoholic beverages were between 3:00 p.m. and 6:00 p.m., but the late hours between 10:00 p.m. and midnight were important because of the potential for "party" business, and sales of milk, bread, and eggs.

The testimony of the various protestants seems to suggest that they were of the impression that, rather than merely a 10:00 p.m. restriction on the sale of alcoholic beverages, they were seeking a 10:00 p.m. store closing. However, there is nothing in the proposed condition limiting the hours during which alcoholic beverages may be sold

that requires appellant to close his doors at 10:00 p.m. on Mondays through Thursdays.

Thus, the fact that appellant's store may remain open from 10:00 p.m. until midnight, even without the ability to sell alcoholic beverages, could very well result in the increase in the traffic and traffic noise protestants fear. The decision does not attempt to isolate late night noise associated with the purchase of alcoholic beverages from that generated by customers for appellant's non-alcoholic stock in trade, nor could it. The record contains no evidence of the existing volume of traffic or what may be expected in the future as the surrounding area is developed.

The decision includes a finding that other businesses in the center close "by or about 9:00 or 10:00 p.m.," and relies on this finding for its conclusion that appellant's business will generate the late night traffic about which the protestants have expressed their concerns. The transcript authority cited in the Department's brief in support of this finding is extremely weak, and incapable of supporting the finding.³ In fact, the record lacks any substantial evidence of the hours of operation of the restaurants or other

³ "Q. Do you know how late the two restaurants are open that are in the shopping center?

A. I did not check that. I would assume – I believe they close at 9:00 or 10:00." [RT 112.]

"Q. What time would you like to see it close?

A. When the other establishments close, which would probably be around 10:00." [RT 125.]

"Q. The question that I was basically asking is you'd prefer that they close at 10:00 p.m.

[A] I prefer that they close when the restaurants close, which is probably 9:00 or 10:00." [RT 126.]

businesses in the center.⁴

With such minimal evidence, the question is whether the Department's desire to bar appellant's sale of alcoholic beverages after 10:00 p.m. four days of the week is unreasonable. The protestants, and, ultimately, the ALJ, believed that such a restriction was reasonable and necessary to protect them against unwanted noise. In appellant's favor is his belief that most of his alcoholic beverage sales take place earlier in the day; the business appellant hopes for in the late evening is the sale of alcoholic beverages that accompany food sales, and the Department's order would appear to have only an incidental effect on food sales.

Given the state of the record, we are unable to conclude that the concern of the protestants, based upon the proximity of the proposed premises to their residences, constitutes substantial evidence in support of the proposed condition limiting hours of operation. The condition does not have a reasonable nexus to the perceived problem of late night residential neighborhood noise.⁵ We think the ALJ gave insufficient consideration to the existence of the natural impediments to noise travel shown to exist - a wide street, trees, a wall, and the location of the proposed premises within the

⁴ Appellant has filed a Request for Judicial Notice/Notice of Lodgment purporting to show hours of operation and licensing restrictions of other establishments in the Davis area. We decline to consider this filing. All of this information was available to appellant prior to the hearing, so does not qualify as newly-discovered evidence.

⁵ While the considerations which led the City of Davis to permit hours of operation until midnight are not binding on the Department, we do think they are entitled to some weight, at least in circumstances where it is unknown to what extent late night noise will be associated with the sale of alcoholic beverages as contrasted with ordinary food items, over which the Department has no jurisdiction.

center.

ORDER

The decision of the Department is reversed. The Department and protestants have not met their burden under Business and Professions Code §23801.

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