

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

**AB-7774**

File: 41-337214 Reg: 00049170

LUZVIMINDA LIWANAG TUATA dba Minda's Restaurant  
2227 Pacific Avenue, Long Beach, CA 90806,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 1, 2001  
Los Angeles, CA

**ISSUED DECEMBER 28, 2001**

Luzviminda Liwanag Tuata, doing business as Minda's Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which denied her petition for modification of a condition on her license regulating hours of sale.

Appearances on appeal include appellant Luzviminda Liwanag Tuata, appearing through her counsel, Ralph Barat Saltsman and Stephen Warren Solomon and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

**FACTS AND PROCEDURAL HISTORY**

Appellant's license was issued, with conditions, on March 8, 1998. One of the conditions on the license limited the hours during which appellant was permitted to sell alcoholic beverages to those between 11:00 a.m. and 11:00 p.m. Appellant's petition,

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<sup>1</sup>The decision of the Department, dated February 22, 2001, is set forth in the appendix.

sought the modification of that condition to permit the sale of alcoholic beverages between the hours of 5:00 p.m. and 1:00 a.m.

An administrative hearing was held on January 11, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision denying the petition.

Appellant thereafter filed a timely notice of appeal, and makes the following contentions as to why the decision should be reversed: (1) there have been changes in circumstances since the original license was issued; (2) there has been no disturbance of residential quiet enjoyment; and (3) there is no reasonable relationship between the condition and residential quiet enjoyment. These contentions are interrelated and will be addressed together.

## DISCUSSION

### I

The condition in question is one of eleven conditions imposed on appellant's license at the time it was issued. The petition for conditional license contains, among others, the following recitals:

"WHEREAS, the proposed premises are located in Census Tract 5731.00, where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business and Professions Code; and

"WHEREAS, the petitioner(s) stipulate that by reason of the aforementioned concentration of licenses, grounds exist for the denial of the applied-for license(s) and

"WHEREAS, the proposed premises and/or parking lot operated in conjunction therewith, are located within 100 feet of residence(s); and

"WHEREAS, issuance of the applied-for license without the below-described conditions would interfere with the quiet enjoyment of the property by nearby residents and constitutes grounds for the denial of the application under the provisions of Rule 61.4 of Chapter 1, Title 4, of the California Code of

Regulations;<sup>[2]</sup> and

“WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals.”

The Department’s authority for the imposition of conditions is contained in Business and Professions Code §23800, subdivision (a), which provides, in 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.”

The petition for modification was filed pursuant to Business and Professions Code §23803, which provides, in relevant part:

“The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification, provided written notification is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. The department may not remove or modify any condition to which an objection is filed without holding a hearing ... .”

Appellant presented evidence that none of the eight residents within 100 feet of the premises or of its parking lot had responded to the Department’s notification of the modification request; that the resident who lived directly behind the premises testified that he had not been disturbed during the three years he had lived there, and had no objection to the modification; that nineteen of appellant’s customers had either signed a petition or written a letter supporting the modification; that appellant’s customers used a bank parking lot across the street,

and that appellant was considering installing a swinging door to reduce escaping noise.

Appellant argued that this evidence demonstrated a change in circumstance that entitled her to the modification, and that the Department abused its discretion when it denied her petition.

The Department gave the following reasons (Determination of Issues I and II) for its denial of the petition:

"I. Condition Number 2 was placed on Mrs. Tuata's license in part because there were residences within 100 feet of her restaurant and/or the restaurant's parking lot, and because there was an undue concentration of licenses in the restaurant's census tract. The residences are still there, and there is still an undue concentration of licenses in the census tract. Because two of the grounds which caused the imposition of Condition Number 2 still exist, the Department, consistent with Business and Professions Code Section 23803, need not grant Ms. Tuata's request to modify the condition.

"II. A. Ms. Tuata argued that her request for modification should be granted because her restaurant is not noisy and her neighbors do not object to the modification.

"II. B. As the Alcoholic Beverage Control Appeals Board stated in the Kassab case, 'That no resident protested is irrelevant. The Department must consider not simply the present residents but residents who may occupy the nearby residences in the future who may well feel that their quiet enjoyment is interfered with by appellant's sale of alcoholic beverage and the problems that result.' (1997) Case Number AB-6688, pg. 10.

"'Whether or not such nearby residents filed protests or objected to the issuance of the license, is of little value in the assessment whether a license should issue. The Department is duty bound to protect the quiet enjoyment of all nearby residents, whether they reside within 100 feet or not, or whether they file protests or not. Additionally, the Department owes that duty to residents not now residing in the area, who may in the future so reside. In short, the Department is to evaluate the reasonable potential for detriment to those located nearby.' Savegh (1999) Alcoholic Beverage Control Appeals Board Case Number AB-7295, pg. 5.

“II. C. The Department’s duty is just as applicable in a condition modification case as it is in a license issuance case. Ms. Tuata’s argument is given little weight.”

It is clear from the evidence that “the grounds which caused the imposition of the conditions” continue to exist. There are residences within 100 feet of the premises and/or its parking lot. The fact that the occupants of these residences did not oppose the modification is irrelevant. (See Kassab (1997) AB-6688; Savegh (1999) AB-7295.)

Appellant’s argument that “circumstances have changed” misses the mark. While some circumstances may have changed, i.e., that it is in appellant’s interest to operate on a different schedule, with later hours, what controls is the language of the statute - the grounds which caused the imposition of the condition must no longer exist.

In the last analysis, appellant failed to make a case for the requested modification, and the Department was well within its discretion in denying her petition.

#### ORDER

The decision of the Department is affirmed.<sup>2</sup>

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

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<sup>2</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.