

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

AB-7782

File: 47/58-346759 Reg: 00049369

TERRENCE BEASOR, et al.,
Appellants/Protestants

v.

RICHARD NUEL CLARKE dba Tavern On Main
2907 Main Street, Santa Monica CA 90405,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael A. DiSanto

Appeals Board Hearing: February 7, 2002

Los Angeles, CA

ISSUED MAY 28, 2002

Terrence Beasor, Carmen Cordova, Larry Cordova, Jane Drake, Anita Holcomb, Shirley Kelson, Muriel Minot, and Harvey F. Newman (protestants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which overruled their protests and granted the application of Richard Nuel Clarke doing business as Tavern On Main (applicant), for a person-to-person transfer of an on-sale general public eating place license.

Appearances on appeal include protestants Terrence Beasor, Carmen Cordova, Larry Cordova, Jane Drake, Anita Holcomb, Shirley Kelson, Muriel Minot, and Harvey F. Newman, appearing through their counsel, Joshua Kaplan; applicant Richard Nuel Clarke, appearing through his counsel, Timothy Bice; and the Department of Alcoholic

¹The decision of the Department, dated March 6, 2001, is set forth in the appendix.

Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Applicant filed his application on September 18, 1998, for a person-to-person transfer of an on-sale general public eating place license. Protests subsequently were filed in opposition to the transfer of the license.

An administrative hearing was held on October 10, 2000, at which time oral and documentary evidence was received. Applicant has apparently managed the premises since 1997 when he was qualified as a manager of the premises by the Department [RT 37]. The Department has crafted six conditions which the Department felt would “eliminate” [RT 34] noise to the nearby residents. Apparently, the premises is located in a beach area of the City of Santa Monica which is a tourist attraction.

Subsequent to the hearing, the Department issued its decision which determined that the protests should be overruled and the license be issued, with a condition modified.

Protestants thereafter filed a timely notice of appeal. In their appeal, protestants raise the issue that the decision and its findings are not supported by substantial evidence.

DISCUSSION

Protestants contend that the decision and findings are not supported by substantial evidence, arguing that issuance would be in violation of Business and Professions Code §23790; the conditions will not eliminate unacceptable noise from the premises; and applicant has not shown that his operation would not be detrimental to residential quiet enjoyment as set forth in 4 California Code of Regulations, division 1, §61.4.

The Department is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would not be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (Martin v. Alcoholic Beverage Control Appeals Board (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from Weiss v. State Board of Equalization (1953) 40 Cal.2d 772, 775.) "[T]he Department's role in evaluating an application for a license to sell alcoholic beverages is to assure that the public welfare and morals are preserved 'from probable impairment in the future.'" (Kirby v. Alcoholic Beverage Control Appeals Board (Schaeffer) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857, 498 P.2d 1105.]

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

"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].) 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] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control

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

(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].) Conflicts in the evidence oftentimes involve the credibility of the witnesses. 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].)

The court in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App.2d 489 [30 Cal.Rptr. 219, 222], enumerated several considerations the Department may consider in determining if a license would endanger welfare or morals: "the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protests made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

Having set forth some of the principles that we feel direct us in this review, we now consider the contentions and arguments of protestants.

Protestants argue that the conditions as proposed by the Department will not eliminate unacceptable noise from the premises.

The Department's decision points out that the present operation has only one condition on the license, which if the presently applied-for license is denied, would continue with that one condition. If the license is granted, there would be six conditions, which the Department's investigator stated would eliminate the noise

problem [RT 34].

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800, subdivision (a), is that "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] 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..."

We therefore view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"³ in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The Department's decision states:

"The conditions on the license appear to insure that operation of the Applicant's intended business will not interfere with the quiet enjoyment of the property by the Protestants and other Rule 61.4 and nearby residents. Revised conditions appear required to insure residential quiet enjoyment with the normal hours that a business may be expected to produce noise levels of a high nature."

The conditions state that sales, service and consumption of alcoholic beverages shall be permitted in the patio "only" up to 12 midnight, every day; entertainment provided shall not be audible beyond 10 feet from the rear property line, amplified systems or devices are prohibited on the patio, and the premises will be in conformity to

³See Webster's Third New International Dictionary, 1986, page 1524.

the statutes which define a bona fide eating place license (restaurant).

Leslie Sokolow, who has two small children [RT 141], has lived in her home for about 3 years (approximately three houses from the premises), and in the neighborhood for 10 years. She hears noise from music, which is her greatest complaint at night, but also hears people who talk loudly, yelling and toasting [RT 140, 146, 156]. She has called the police [RT 146]. Her children cry by being unable to sleep for the last three years [RT 142]. She and her husband installed air conditioning in the premises, even though just two blocks from the beach, so that all the windows could be closed at night [RT 143].

The Department's investigator testified that the new conditions would eliminate noise problems [RT 34], and the decision [Determination of Issues III, third full paragraph] states that: "The conditions in the license appear to insure that operation ... will not interfere with quiet enjoyment of the property by protestants ... and nearby residents."

What is disturbing, is that these statements appear in looking at the decision from a practical view, to be sheer rhetoric devoid of substance and obvious thought. With past complaints, and the midnight cessation in the patio area of alcoholic beverage sales and service, nightly, it would appear the investigator's conclusions and the decision are based upon nonsense.

Another disturbing thing is that the conditions only speak to the 12 midnight closing, but does not consider, and the record does not speak to, the remainder of the premises. Exhibit 4 shows a diagram of the premises and patio. It shows a dining area. Presumably, the premises could stay open and serve beverages to 2 am in the dining premises. Nothing in the record speaks to the dining area within the premises,

and its hours of operation.

The decision states that if the license is not issued to the applicant, the premises, under the applicant's management as it is now, could stay open to 2 am, a statement which is highly ambiguous – the illusion is that the patio is the only place that dining is provided, but there is nothing in the record to show this is true.

The bold pontification of the Department investigator's conclusion that the conditions would eliminate noise, where the record shows the patio is open, nightly, until midnight, and, the premises apparently is serving alcoholic beverages until 2 am, within the premises, is certainly an apparent illusion with little if any, foundation or support thereof.

Protestants also argue that applicant has not shown that his operation would not be detrimental to Rule 61.4, residential quiet enjoyment.

The Department's rule which regulates nearby residential quiet enjoyment, does not apply, as the premises has been licensed and operated with the same type license within 90 days of the application to transfer.

Protestants finally argue that issuance would be in violation of law, as the premises does not conform to the zoning laws of the city. The statute in question states in pertinent part:

“No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any ... city.”

The other portions of the statute do not appear to apply.

The Department's investigator testified in answer to a question that the license should not issue if the premises and operation are not properly zoned, stated: “That section is not applied to the person-to-person transfer” We find great difficulty with

the investigator's opinion as we find nothing in the statute that would so limit the applicability of the statute. Also, the decision does not answer the question whether the premises is properly zoned, only assuming such is the case. The record is deficient.

Exhibit A, and mainly Exhibit B, is a Notice of Violation from the Building and Safety Division of the city, apparently a division which is responsible for the control of unsafe conditions and zoning, dated July 11, 2000, a period of about 90 days before the administrative hearing in this matter, stating the premises is operating in violation of the code. The Notice says the only approved occupancy of the premises is for a retail store. The notice concludes that prior to a change of use or occupancy to a restaurant/bar lounge, a building permit is required.

Suzanne Frick, the city's Director of Planning and Community Development, testified that she was familiar with the Notice, but it was issued without proper analysis of the situation. She stated the Notice had not been recanted, and offered some explanation which begs the question. She also stated the use of alcohol was "grand fathered in." While Frick's views may have some plausibility, there is no evidence that her agency and jurisdiction is responsible for unsafe conditions and zoning, in a word, her testimony carries very little weight and authority. The decision is defective based upon assumptions improperly made, and not supported by substantial evidence.

The record shows inadequate investigation and consideration, appearing to be just sufficient to appear valid.

ORDER

The decision along with the areas reviewed, show little insight and plausibility in its conclusions. Whether or not the issuance of the license should be approved is a matter for the Department, after, it has adequately addressed the

concerns and issues raised. The protestants sustained their burden to show real questions of noise and disturbances, in the past and reasonably plausible in the future. Applicant and the Department have not, considering Kirby, supra, that the Department is to protect the welfare and morals from future impairment. (See also Martin, supra.) There is no substantial evidence to support the decision.

The decision of the Department is reversed.⁴

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

⁴This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.