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

AB-7823
File: 20-355985 Reg: 00048877

7-ELEVEN, INC., and DIANE MARIE CONLAN dba 7-Eleven #24133
2190 Bacon Street, San Diego, CA 92107,
Appellants/Applicants

v.

DAVID BEJARANO, et al.
Respondents/Protestants,

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 7, 2002
Los Angeles, CA

ISSUED MAY 10, 2002

7-Eleven, Inc., and Diane Marie Conlan, doing business as 7-Eleven #24133 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] made pursuant to Government Code §11517, subdivision (c), which denied their application and petition for the issuance of an off-sale beer and wine license, with conditions, for premises located in the Ocean Beach area of San Diego.

Appearances on appeal include appellants/applicants 7-Eleven, Inc., and Diane Marie Conlan ("applicants" or "appellants"), appearing through their counsel, Jeffrey A. Vinnick; protestants David Bejarano, Chief, San Diego Police Department, appearing

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[1]The decision of the Department, dated May 30, 2001, issued pursuant to Government Code §11517, subdivision (c), is set forth in the appendix, together with the proposed decision submitted by the Administrative Law Judge.

through Sergeant Michael Davis, Kip Krueger, Daniel R. Morales, David Parrish, Christine A. Poirer, James H. Rosenthal, Charles Sims, Debra Tietjen, Mark Williams, Mike Zajic, Robert J. Bernal, Alexander D. Cameron, Jr., Joseph K. Fox, Gerald James Samuels, and John R. Weishaupt, appearing through their spokesperson, Daniel R. Morales; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

The original application of Diane Marie Conlan and 7-Eleven, Inc., for the license in question was the subject of a number of protests, and was denied by the Department. Thereafter, appellants petitioned for a hearing. A hearing was conducted on July 25 and September 19, 2000. The issues addressed in the hearing were whether the issuance of the license would be contrary to public welfare and morals in that (1) the premises are located in a residential area and normal operation of the premises will interfere with the quiet enjoyment of their property by nearby residents due to noise, trash or litter, traffic and/or loitering; (2) issuance of the license would tend to create a law enforcement problem, an undue concentration of licenses in the area, and traffic, litter, and loitering problems.

Following the hearing, Administrative Law Judge Rodolfo Echeverria ("the ALJ") submitted a proposed decision approving the application and overruling the protests, subject to the applicants' acceptance of a number of conditions to be imposed on the license designed to protect the quiet enjoyment of nearby residents, some of whom

were located within 100 feet of the premises or its parking lot.[2] He gave the following reasons for the need to impose conditions:

> "Even though the Petitioners have demonstrated that they are willing to go to great lengths in the training of their clerks and in setting policies to mitigate any impact on nearby residents resulting from the sale of alcoholic beverages as indicated above, and even though the Petitioners are bound by the many conditions included in their conditional use permit, they have not met their burden in establishing that the operation of a licensed premises will not interfere with the quiet enjoyment of the nearby residents without a complete set of conditions. The fact that there is a considerable number of residences located within 100 feet of the premises, the fact that the premises are located in a high crime area, the fact that transients frequent the area, the fact that drinking and rowdiness occurs in the area, the fact that nearby residents have experienced beer bottles in their yard and have been disturbed by loud fighting and yelling make it abundantly clear that a comprehensive list of conditions must be attached to any alcoholic beverage license at the premises to minimize any adverse effect resulting from the sale of alcoholic beverages at the premises. Therefore, issuance of the applied for license without a comprehensive list of conditions would be contrary to Rule 61.4 and public welfare and morals."

The conditions addressed such things as the hours of operation, the types and quantities of alcoholic beverages which may be sold, lighting, exterior advertising, loitering, consumption at or around or adjacent to the premises, litter, and the time when deliveries were permitted.[3]

The Department rejected the proposed decision pursuant to the authority granted it in Government Code §11517, subdivision (c), and issued its own decision. The Department retained the findings by the ALJ that the issuance of the license would

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[2] The proposed conditions, some of which were already incorporated in the conditional use permit issued by the city of San Diego, are typical examples of conditions commonly utilized by the Department in circumstances where there is concern that, without such conditions, the quiet enjoyment of nearby residents might be unduly disturbed.

[3] Many of the conditions proposed by the ALJ were already incorporated in the conditional use permit issued by the city.

not tend to create law enforcement, litter, loitering, or traffic problems, but reached a contrary conclusion with respect to the prospective impact on nearby residents. The Department reasoned as follows:

> "The petitioners have not met their burden in establishing that the operation of a licensed premises will not interfere with the quiet enjoyment of the nearby residents. There is a considerable number of residences located within 100 feet of the premises, as well as within the area immediately surrounding the premises. It is established that the premises are located in a high crime area, that transients frequent the area, that nearby residents have experienced beer bottles in their yards and sidewalks, and have been disturbed by loud yelling and fighting associated with the use and consumption of alcoholic beverages, which has disrupted their quiet enjoyment of their property. It is abundantly clear that the quiet enjoyment of their property has been seriously compromised by these alcohol related problems. The addition of yet another alcoholic beverage outlet in the area will not enhance their quality of life, but instead will more likely than not exacerbate the degradation of their already diminished quiet enjoyment of property."

Appellant has filed a timely appeal, and contends as follows: (1) The decision of the Department is not supported by its findings or by substantial evidence; (2) substantial evidence establishes that the issuance of the license will not interfere with the residents' quiet enjoyment; (3) the Department's decision is based upon speculation; and (4) the Department, in weighing the evidence, did not address the protestants' personal motivations for opposing the issuance of the license. The first three issues are closely related, and will be treated as a single issue, i.e., was there record support for the Department's determination that appellants had failed to meet their burden under Rule 61.4, that issuance of the license would not interfere with the quiet enjoyment of residents located within 100 feet of the premises.[4]

[4] It was not appellants' burden to disprove any effect on residents located in the area surrounding the premises but located further than 100 feet from the premises.

DISCUSSION

I

Appellants contend that the Department's findings do not support its decision, that substantial evidence demonstrates that issuance of the license will not disturb the quiet enjoyment of nearby residents, that the Department's decision is based upon speculation, and the Department placed inappropriate weight on the testimony of protestants whose motives in opposing the application were fueled by personal animosity.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would 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.[5]

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 [71 S.Ct. 456]; 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].)

The Department Investigator, who recommended that the application be denied, visited the area on five occasions. She described the area in question as “mixed

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[5] 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].

residential and commercial ... [r]esidential single-family homes, multi-unit residence and commercial," two and one-half blocks from the ocean. There are three other existing licensees in the immediate area: two off-sale general licensees, licensed to sell beer, wine, and spirits, and one off-sale beer and wine license, authorized to sell only beer and wine. The off-sale beer and wine licensee is located at the opposite street corner from the applicants. In addition, there are four on-sale licensed premises near the applicants' premises.[6] During the investigator's visits, she saw no evidence of littering or loitering.

Although there are 23 residences located within 100 feet of the premises, none directly abuts the property on which the proposed premises are located. Two of the residences are, however, located within 30 feet of the parking lot. None of the occupants of these residences protested the application. One of the protestants owns one of the residences, but does not reside there. Some of the residences are located across an alleyway, others are separated by surrounding streets. The only property that directly abuts the proposed premises is a commercial equipment rental business.

The investigator did not inspect the interior of the proposed premises, nor did she in the course of her investigation interview the operator, Ms. Conlan. She did review the conditions set forth in the conditional use permit.

The thrust of the Department's decision is that, despite the findings that issuance of the license would not tend to create a law enforcement problem, an undue concentration of licenses in the area, or traffic, litter, and loitering problems, applicants

[6] Investigator Roji testified that the last off-sale license issued in the census tract in question was issued in 1976.

had, nonetheless, not met their burden of establishing that the operation of the premises will not interfere with the quiet enjoyment of the nearby residents. The Department stressed four factors: the premises are located in a high crime area; transients frequent the area; drinking and rowdiness occur in the area; and nearby residents have experienced beer bottles in their yards and sidewalks and have been disturbed by loud yelling and fighting associated with the use and consumption of alcoholic beverages. The Department's conclusion necessarily rests heavily upon the testimony of the four protestants which is summarized in the findings in Finding of Fact IV, none of whom reside within 100 feet of the proposed premises.

The findings seem inconsistent with the Department's overall conclusion. Whether that is so requires a closer look at the evidence, and the implications of Rule 61.4.

Rule 61.4 shifts to the applicants the burden of proving non-interference with quiet enjoyment of residents located within 100 feet of the proposed premises. The Department bears the burden of proof with respect to nearby residents farther than 100 feet from the premises.

It is obvious that Rule 61.4 imposes a considerable burden upon an applicant, especially since the rule requires the applicant to prove a negative. At best, an applicant can point to measures intended to prevent the kind of activity that would result in residential disturbance, by the adoption and enforcement of sound and strict operating policies, careful selection of personnel, a close eye on the operation of the business, and the acceptance and implementation of license conditions which may be required by the Department. Given human frailty, there is always the possibility that a purchaser of alcoholic beverages will, by his or her behavior, interfere with the quiet

enjoyment of the residents who happen to live near a store - or, indeed, any other kind of establishment - which sells alcoholic beverages. In addition, an applicant confronted by Rule 61.4 must also deal with alcohol related problems which pre-exist the applicant's entry into the market, but which tarnish its own chances for a license.

The evidence in this case demonstrates that applicants have operated the store in question for 10 or more years (Ms. Conlan claims 13 years) in an impeccable manner. There is no reason to think that the business policies in force which helped her attain a solid reputation and a loyal patronage (some 2500 of her customers supported the application) over the years would change once she enjoyed the privilege of selling beer and wine along with her existing stock in trade.

By and large, the principal objection raised by the protestants who testified was against any additional licenses, the protestants expressing the belief that additional outlets for alcoholic beverages necessarily mean an increase in criminal activity. It would seem that these concerns were not accorded a great deal of weight, either by the Department or the ALJ, both finding that issuance of the license would not tend to create a law enforcement problem.

James Rosenthal, a former employee of Southland Corporation (now 7-Eleven, Inc.), lives 189 feet from the premises. He complained about loud yelling, fighting, and beer bottles strewn on his sidewalk and lawn. It would appear to be his testimony that is most reflected in the Department's determination that applicants failed to meet their burden in establishing that the operation of a licensed premises would not interfere with the quiet enjoyment of nearby premises.

Again, we have difficulty following the Department's reasoning process. Rosenthal's testimony has relevance to problems associated with alcohol, as well as to

the possible adverse effect on nearby residents, but we question the extent to which the Department appears to have relied on the testimony of a resident situated well beyond 100 feet from the proposed premises to support its conclusion that applicants failed to meet their burden of proof under Rul 61.4. We also think the fact that none of the matters about which he complained could have been generated by Ms. Conlan's operation detracts from the weight his testimony might otherwise deserve.

The Department has a broad discretion with respect to the issuance or denial of a license. As stated in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 149 (30 Cal.Rptr.219):

> "[T]he Department exercises a discretion adherent to the standard set by reason and reasonable people, having in mind that such a standard may permit a difference of opinion upon the same subject. If the decision reached is without reason under the evidence, the action is arbitrary; constitutes an abuse of discretion; and may be set aside. Where the decision is the subject of choice within reason, the Department is vested with the selection which it deems proper; the action constitutes a valid exercise of that discretion; and the Appeals Board or the court may not interfere therewith."

What troubles us here is the Department's conclusion that applicants failed in their burden of proof under Rule 61.4 without explaining in any way why the conditions contained in the conditional use permit issued to the applicants, or the conditions set forth in the proposed decision, would not protect the nearby residents.

As this Board observed in Summit Energy Corporation California (2001) AB-7585:

> "The Appeals Board knows from having reviewed many cases implicating Rule 61.4 that the Department frequently approves the issuance of a license even though the premises may be within 100 feet, or closer, to a residence or residences. In so doing, the Department ordinarily reviews conditions included with the applicant's petition, and sometimes engrafts additional conditions which, if accepted by an applicant, result in the overruling of protests."

The Department's decision pays the barest of lip service to the role conditions

might play in the license sought by the applicants. It recites that its investigator reviewed the conditional use permit, and states the subject matter of certain of the conditions in the permit. The decision reflects no substantive consideration of any individual permit condition, nor does it even mention the conditions suggested by the ALJ.

Which leads us to conclude that the Department has acted arbitrarily. We know that off-sale licenses are often granted engrafted with conditions similar to those in the use permit , as well as those proposed by the ALJ. Further, we must assume such conditions have proven effective in eliminating or minimizing any problems that might disturb residential quiet enjoyment, or the Department would have discontinued their use long ago. Why, then, in a case so close on the facts with respect to the issue of quiet enjoyment, were they not even considered?

As this Board said in Summit Energy, supra:

> "The Department must, and should, take a broader view than any single protestant, and must draw upon its expertise when determining what may flow from the issuance of a license. If a Rule 61.4 protestant's objection is treated as a veto, then any application for a license which could be granted with appropriate conditions would die stillborn."

We further noted in that case that whether or not any license ultimately issues is dependent upon the Department's discretion, reasonably exercised. This Board can do no more than protect an applicant against arbitrary action, as we think took place here.

II

Appellants contend that the Department did not properly weigh the opinions and testimony of several of the protestants because it failed to address their personal motivations for objecting to the petition. Appellants suggest that protestant Daniel

Parrish offered to withdraw his protest in return for a share of the store's gross profits, that protestant Christine A. Poirer was a disgruntled former employee, and protestant Daniel Morales had by his actions prompted an investigation by the San Diego City Attorney's office.

In light of our disposition of this matter, we see no need to address this issue.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein.[7]

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

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[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.