

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

AB-7892

File: 20-361020 Reg: 00049310

7-ELEVEN, INC., and M & N ENTERPRISES, INC. dba 7-Eleven Store #2121-13642
2920 Adrian Street, San Diego, CA 92110,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 4, 2003

7-Eleven, Inc., and M & N Enterprises, Inc., doing business as 7-Eleven Store #2121-13642 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which denied their petition to modify conditions on the license.

Appearances on appeal include appellants 7-Eleven, Inc., and M & N Enterprises, Inc., appearing through their counsel, Jeffrey A. Vinnick, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued with twelve conditions imposed upon it. Appellants now seek the elimination of the following five conditions:

"1. No wine products shall be sold in containers less than 750 milliliters, except

¹The decision of the Department, dated October 18, 2001, is set forth in the appendix.

for wine coolers sold in four pack quantities per sale as prepackaged by the manufacturer.

“2. No wine products shall be sold with an alcoholic beverage content greater than fifteen percent (15%) alcohol by volume in containers which have screw or twist off caps.

“3. No beer, malt liquor or other malt beverage product(s) shall be sold in less than four-pack or six-pack quantities per sale as prepackaged by the manufacturer. Keg beer, malt liquor or other malt beverage products will not be sold in containers smaller than six gallons.

“9. Sales of alcoholic beverages shall be permitted only between the hours of 8:00 A.M. and 12:00 Midnight each day of the week.

“12. There shall be no exterior advertising or sign of any type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverages or signs which are clearly visible from the exterior or [sic] the premises constitutes a violation of this condition.”²

The petition for conditional license sets forth, as recitals, a number of reasons why issuance of an unrestricted license would be contrary to public welfare and morals, including the following: (a) interference with the quiet enjoyment of their property by nearby residents (Rule 61.4) (4 Cal. Code Regs. §61.4); and (b) undue concentration (Bus. & Prof. Code §§ 23958 and 23958.4). The Administrative Law Judge (ALJ) determined that the license would not have been issued without conditions because of the Rule 61.4 and undue concentration considerations, and that those considerations had not changed.

² Elimination of the conditions would permit appellants to sell wine in containers less than 750 milliliters; to sell wine with an alcoholic volume greater than 15 percent by volume, with screw tops or twist-off tops; to sell single containers of beer and other malt beverages; to advertise those and other alcoholic beverages outside their store; and would enlarge the time during which such products could be sold to the maximum permitted by law.

Appellants contend, contrary to the conclusions drawn by the ALJ, that the grounds for imposition of the conditions no longer exist. Appellants argue that the Department has failed to establish that modification of the conditions would interfere with the nearby residents' use and enjoyment of their property; that it is logical to assume that the conditions were imposed, in large part, because of the protests of the San Diego Police Department; that crime has decreased dramatically since the license was issued; and that, since the City of San Diego necessarily made a finding of public convenience and necessity when it issued a conditional use permit for the sale of beer and wine, undue concentration was no longer a consideration.

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.³

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corporation v.*

³The 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].

National Labor Relations Board (1951) 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].)

There is little dispute with respect to the facts. Appellants do not contend that there are no residences within 100 feet of the premises and its parking lot. Instead, they suggest that, since only one protest was received by the Department when the license issued, and in response to the petition for modification, Rule 61.4 is no longer a consideration. They argue further that the Department erred by failing to modify the conditions in light of the decrease in crime in the census tract in which the premises are located.

Business and Professions Code section 23803 provides:

“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”

The premises are located within 80 feet of a two-story apartment complex, and within 50 feet of an apartment complex with 52 apartment units. The manager of the 52-unit complex protested the original issuance of the license, and objected to the proposed modifications.

Rule 61.4 prohibits the issuance of a license where there are residences located within 100 feet of the proposed premises and its parking lot, unless the applicant establishes that its issuance will not interfere with the quiet enjoyment of their property by those residents. The applicant bears the burden of proof in such a situation.

The conditions which appellants seek to remove are of the kind this Board has seen on many occasions where Rule 61.4 has application. It is relatively unusual in this Board's experience that a license issues in a Rule 61.4 context without such conditions, or conditions closely similar to those in this case.

We can only assume that the existence of a Rule 61.4 context was an important consideration in connection with the issuance of the license and the conditions imposed on it. One of the recitals in the petition for conditional license specifically referred to Rule 61.4 and the need for the conditions to prevent interference with the ability of nearby residents to enjoy their property.

The ALJ so concluded (Determination of Issues V):

"The clear weight of the evidence shows that the stipulated conditional license would not have been issued without the conditions then imposed due to three prevailing situations:

"(1) that there existed an undue concentration of licenses in the then Census Tract 68;

"(2) a violation of Rule 61.4 existed in that the subject premises were located within 100 feet of a residence;

"(3) a protest had been filed by the San Diego Police Department.

"Therefore the grounds that caused the imposition of the conditions on the license continue to exist. The subject premises are located within 100 feet of residences. The quiet enjoyment of the persons occupying such housing continues to be interfered with by the operation of the premises. The petitioners have not established otherwise. Indeed, several of those residents have requested that they be transferred to other apartment units within the complex so as not to have their bedrooms face the subject premises.

"Additionally, there has been no credible attempt on the part of the Petitioners to show that there does not exist an undue concentration of licenses within Census Tract 68.02. As was the situation at the time of the original issuance of the conditional license, seven on-sale retail licenses existed within the designated Census Tract wherein five on-sale licenses were permitted. Therefore, under Section 23958.4, there existed an undue concentration of licenses."

We would be ignoring the recitals in the original petition for conditional license

were we to conclude that the crime rate in the census tract was the only, or even a significant, reason for the imposition of the conditions. The recitals make it clear that the location of residences within 100 feet of the premises, as well as an undue concentration of licenses, were the primary, if not controlling, grounds for the conditions. The existence of a substantial number of apartment residences within 100 feet is, itself, enough to support the imposition, and retention, of the conditions despite a decrease in the crime rate in the census tract.

We think it clear that the grounds which led to the imposition of the conditions when the license first issued have not changed. The ALJ ruled correctly when he denied the request for modification.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.