

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

AB-7922

File: 41-371746 Reg: 01051166

RAYMOND BROAD and DERNIE WAIKIKI, dba Springville Ranch
36400 Highway 190, Springville, CA 93627,
Appellants/Applicants

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: October 24, 2002
San Francisco, CA

ISSUED JANUARY 15, 2003

Raymond Broad and Dernie Waikiki, doing business as Springville Ranch (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ imposing amended and additional conditions as a prerequisite to granting them the on-sale beer and wine public eating place license for which they have applied.

Appearances on appeal include appellants Raymond Broad and Dernie Waikiki, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellants applied for an on-sale beer and wine public eating place license on November 8, 2000. Thereafter, the Department conducted an investigation pursuant to

¹The decision of the Department, dated January 10, 2002, is set forth in the appendix.

Business and Professions Code section 23958² to determine if the applied-for license should issue. A number of protests were filed by nearby residents. On May 30, 2001, appellants petitioned the Department for issuance of a conditional license which restricted the hours of alcoholic beverage sales and consumption and the hours of entertainment; required licensed security guards, the number of which would be dependent upon the number of people attending an event and whose purpose was to maintain order "and prevent any activity which would interfere with the quiet enjoyment of their property by nearby residents"; and prohibited consumption of alcoholic beverages on property adjacent to the licensed premises which is controlled by appellants.

An administrative hearing was held on October 16, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the proposed use of the property, the concerns of the protestants, and the information gathered during the Department's investigation.

Subsequent to the hearing, the Department issued its decision which sustained, in part, certain of the protests, but allowed appellants to petition the Department for a license incorporating the conditions they had previously agreed to, as amended and augmented by conditions set out in Determination of Issues VI of the Department's decision.

One of the additional conditions, number 7, states that "Live entertainment provided on the licensed premises shall be limited to non-amplified sources and to no more than three musicians at a time, including vocalist(s)." Appellants have filed a timely appeal in which they contend that condition 7 was improperly imposed.

²Unless otherwise indicated, all statutory references are to the Business and Professions Code.

DISCUSSION

Appellants contend condition 7 was not properly imposed because it is not supported by any findings. Implicit in their contention is the assertion that imposition of the condition is not supported by substantial evidence. They argue that there is nothing in the record indicating that live amplified entertainment in this case would be contrary to welfare and morals.

The Department is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license. A license may be denied if the Department reasonably determines for "good cause" that the granting 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 Bev. 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 Bev. Control Appeals Board. (Schaeffer)* 7 Cal.3d 433, 441 [102 Cal.Rptr. 857, 498 P.2d 1105.]

The Department may impose "reasonable conditions" on a license under the authority of section 23800, subdivision (a), which provides that "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 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 view the word "reasonable" as used in section 23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a reasonable connection between the problem that needs to be eliminated and the condition designed to eliminate the problem.

When the Department's findings are attacked for lacking the support 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].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as adequate support for a conclusion. (*Universal Camera Corp. v. Labor Board*. (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456].) It "is not synonymous with 'any' evidence, but is evidence which is of ponderable legal significance," and

"must be 'reasonable in nature, credible, and of solid value' [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'"

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872 [269 Cal.Rptr. 647].)

Determination of Issues V. states as follows:

A. Grounds exist to sustain the protests against issuance of the license to Applicants based on Findings of Fact, paragraphs IV, V, XI and XIII and Section 23958. Operation of the business subject only to the Exhibit 6 (Appendix A) conditions may interfere with quiet enjoyment of nearby

residential property and/or cause a problem with traffic safety in the immediate vicinity of the proposed premises and, therefore, would be contrary to public welfare and morals.

B. The Protestants have been disturbed by noise from events occurring at the proposed premises in the past. The evidence strongly suggests that such disturbances were more frequent and of greater intensity when the property was in the hands of prior owners. The conclusion of Investigator Acosta that operation of the business with reduced late night hours of operation, restricted areas for consumption of alcoholic beverages and security guards will reduce adverse impacts upon nearby residents, makes sense given the record as a whole. Adverse noise impacts on nearby residents will be less, even under ownership by Applicants, operating under a Department-issued license than if they continue to operate restricted solely by the conditions attached to the SUP. This is in contrast to the supposition of some of the Protestants that if the Applicants are licensed, more alcoholic beverages will be consumed and noise difficulties will worsen. The adverse noise impacts that remain will be reasonable.

C. The Exhibit 6 conditions go a great distance in ensuring that operation of Applicants' business with the license sought subject to those conditions will reduce to reasonable level [of] interference with quiet residential enjoyment from levels that have obtained in years gone by. Concern remains, however, due to potential traffic safety issues on both Highway 190 and Balch Park Road from a loss of visibility if vehicles associated with Applicants' premises park on the shoulder of the roadway. *Concern also exists that special events, such as "rock" or other concerts, not mentioned by anyone at the hearing or by Applicants in their submission to the Department could take place that would make the conclusion reached in the preceding paragraph erroneous.* [Italics added.]

In paragraph B., above, the determination states that, under the conditions in applicants' petition for conditional license and in the Special Use Permit issued by Tulare County (SUP), "The adverse noise impacts that remain will be reasonable." Having determined that there will not be a problem if the applicant complies with the existing conditions on the license, the ALJ eliminated any reasonable basis for imposing additional conditions regarding noise.

The italicized language from Determination V appears to be the basis for the condition limiting live entertainment. As the ALJ himself admits, however, neither the

protestants nor the applicants have ever mentioned "'rock' or other concerts" occurring at the proposed premises. The basis for imposing the additional condition is nothing more than the ALJ's speculation that someday, some concert, not contemplated by protestants or applicants, might occur that would not be adequately restrained by the observance of the conditions already imposed.

The determination appears to be based on certain statements in Finding V. In V.B., the ALJ stated: "It is not difficult to conceive use of the property as an outdoor concert venue." Our review of the record found no basis for this statement. Rather, it appears to be based solely on the ALJ's personal opinion. Finding V.D. concludes with the statement: "The amplified music will on most occasions include recorded music with a disc jockey and/or master of ceremonies using a public address system. Applicants specifically did not indicate a desire for live entertainment." The record frequently refers to amplified music and on the "Planned Operation" sheet signed by applicants, two boxes are checked in the section labeled "Entertainment": "Amplified Music" and "Patron Dancing." Nothing in the record supports the statement that the music will "on most occasions include recorded music with a disc jockey and/or master of ceremonies." It is true that applicants did not check the box marked "Live Entertainment" in the "Entertainment" section of the form, but neither did they check 12 other boxes naming various kinds of entertainment. It cannot reasonably be said that they "specifically did not indicate a desire for live entertainment."

We conclude, based on the discussion above, that the determination upon which the condition is based is not supported by *any* evidence in the record, much less substantial evidence. In addition, as we shall discuss below, the condition is neither reasonable nor supported by the determination.

The ALJ's concern was apparently that applicants might host live rock concerts that the neighboring residents would find distasteful.³ Ignoring the improbability of Ozzy Osborne appearing at Springville Ranch, we must acknowledge that, given the testimony at the hearing, the neighboring residents might well find a live rock concert distasteful. However, the complaints from the protestants were about noise, not about a musical genre and not about live entertainment. Amplified live entertainment and performances by more than three musicians are perceived as "problems" only by the ALJ. Therefore, the condition is not reasonably related to the problem it purports to address.

The decision does not impose a condition that directly limits noise, such as ones this Board has often seen that require sound to be confined to the area under control of the licensee. , There seems to be no disagreement that this would be unrealistic, given the outdoor nature of the venue. However, the ALJ appears to be attempting to impose some sort of noise restriction by limiting the number of live musicians that may perform and prohibiting the amplification of any "live entertainment." The condition he imposed does not, however, limit the amplification of recorded music or performances, so it obviously fails to achieve the ostensible purpose to be accomplished: the non-interference with nearby residents' quiet enjoyment of their property. It simply means that a string quartet may not play at a wedding reception, a church choir may not perform at the church picnic, the local musical theater group may not present "The Music Man" or "Phantom of the Opera," but recordings of "heavy metal" rock or

³Given the focus of the operation, as shown in the advertising brochure (Exhibit D), this is a highly unlikely possibility. The facility is advertised, and has apparently been used exclusively, as a venue for gatherings such as weddings, reunions, and birthday parties, where the music and patron dancing are incidental to the event.

"gangsta rap" may be played over the public address system as long as the SUP's decibel level is not exceeded.

Imposing conditions on this license is appropriate, given the past experience of the neighbors. However, we fail to see how the live entertainment restrictions imposed by the Department's decision will have any discernable effect, one way or the other, on the neighbor's quiet enjoyment of their property. The condition goes too far, by prohibiting amplification of all live entertainment, and not far enough, by not putting any kind of restriction on recorded music or entertainment. We do not mean to suggest that it would be appropriate for the Department to impose a ban on amplification of all music. The Department may devise a condition that restricts noise, but it must be reasonable from the perspectives of both the nearby residents and the license applicant. If the Department cannot do so, that does not give it authority to impose a condition that unreasonably restricts certain types of noise and does not even address other types.

ORDER

The decision of the Department is affirmed, except it is reversed insofar as it requires appellants to include condition 7, as set out in Determination VI, in their petition for conditional license, and the matter is remanded to the Department for such further proceedings as may be necessary and appropriate.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 section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.