

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

AB-7967

File: 20-375506 Reg: 01052019

99 CENTS ONLY STORE, dba 99 Cents Only Store
6121 Wilshire Boulevard, Los Angeles, CA 90048
Appellant/Applicant

v.

GERARD M. BENCHANAN, et al.
Respondents/Protestants
and
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 3, 2002
Los Angeles, CA

ISSUED FEBRUARY 4, 2003

99 Cents Only Store, doing business as 99 Cents Only Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which sustained the protests against appellant's application for the premises-to-premises transfer of an off-sale beer and wine license.

Appearances on appeal include appellant 99 Cents Only Store, appearing through its counsel, Russell F. Wolpert and Brian W. Aherne; respondents/protestants Gerard Benchanan, Ronelle Benchanan, and Ernest Cefalu; and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant applied for the premises-to-premises transfer of an off-sale beer and wine license in April 2001. Protests were filed against the application for transfer and

¹The decision of the Department, dated April 18, 2002, is set forth in the appendix.

an administrative hearing was held on February 1, 2002. Documentary evidence was received and testimony concerning the proposed premises and the protests was presented.

The applicant is currently licensed at a 99 Cents Only Store located at 601 South Fairfax Avenue (the Fairfax store). It wishes to move the license to another 99 Cents Only Store located nearby, at 6121 Wilshire Boulevard (the Wilshire store). Fairfax Avenue runs north and south and intersects with Wilshire Boulevard, which runs east and west. The Wilshire store is approximately 100 feet west of the intersection with Fairfax Avenue. North of, and parallel to, Wilshire Boulevard are Orange Street (where the protestants live) and then West 6th Street. Wilshire Boulevard and Fairfax Avenue are commercial areas, while most of Orange Street is residential. The presently licensed Fairfax store is located at the corner of Fairfax Avenue and West 6th Street.

Both stores are located in the same census tract, in which two off-sale licenses are allowed. The Fairfax store's license is the only off-sale license in the census tract; transfer of the license to the Wilshire store would not change the number of off-sale licenses. The crime rate in the applicable police reporting district is well below the average for reporting districts in the City of Los Angeles. No protest was filed by the Los Angeles Police Department, and the local police did not express any concerns about the transfer. The 34 residences within 100 feet of the proposed premises were notified of the application, but none of the residents filed protests.

Applicant filed a Petition for Conditional license, agreeing to conditions which permit the sale and delivery of alcoholic beverages only between 7:00 a.m. and 10:00 p.m.; prohibit gross receipts from alcoholic beverage sales to exceed those from other

products; require applicant to keep the area adjacent to the premises free from litter; and require graffiti to be removed or painted over within 48 hours of being applied.

Department investigator Joanne Aguilar testified regarding the Department's investigation² of the application to transfer the license. The Department investigator's report of the investigation concluded that there was no evidence to substantiate the protest issues, the city planning and police departments had no objections, conditions would be placed on the license restricting hours of operation and gross sales of alcohol, and operation of the business with the license would not adversely affect the area. The report recommended approval of the application for a conditional license.

Gerard Benchanan, one of three protestants, said he was "mostly concerned about the traffic problem." He described traffic congestion on Orange Street that he said was caused by people trying to get into the Wilshire store parking lot, which can be entered from Orange Street. He also mentioned noise from delivery trucks at 7:30 in the morning.

Gerard's wife, Ronelle Benchanan, told of transients hanging around the Fairfax store, carrying 99 Cents Only Store bags in which she said they carried alcoholic beverages. She admitted she did not know what was in any of the bags, and was not sure whether any of the transients she had seen were drinking alcoholic beverages. However, she was concerned that transients would buy beer and wine cheaply at the 99 Cents Only Store. She asserted that "[t]he only people that are going to go [to the

²The investigation was begun by investigator Vo, but was reassigned to investigator Baltodano, who left the employ of the Department sometime prior to the hearing. Investigator Aguilar was assigned to review the report prepared by Baltodano and to verify the information in the report and to attend the hearing on behalf of the Department. The report itself was not placed into evidence.

Wilshire store] are the people that are panhandling all the time at Wilshire and Fairfax." [RT 107.] She was also concerned about the traffic into the Wilshire store parking lot.

Ernest Cefalu testified about seeing transients near the Fairfax store with 99 Cents Only Store bags, drinking what he assumed was alcohol. He asserted that if the Wilshire store began selling alcoholic beverages, the problems he had seen at the Fairfax store would increase because the Wilshire store is bigger and would attract more people. On cross-examination, Cefalu admitted that he had never been in the Fairfax store and did not know what type of wines were sold there or the quantities (e.g., single cans, six-packs, four-packs) in which beer and wine was sold. He also mentioned the noise from delivery trucks and the traffic into the parking lot at the Wilshire store.

David Gold, CEO of appellant corporation, testified that in the 13 years that the Fairfax store had been open and selling alcoholic beverages, they had no ABC or health violations. Beer and wine are not everyday products in the 99 Cents Only Stores, Gold explained; they are offered in their stores only when appellant can find a beer or wine that is an exceptionally good value. He stated that the 99 Cents Only Stores sold only "cork" wines and did not sell any fortified wines.³ Most of the beers they sell are foreign beers rather than the widely distributed domestic brands such as Budweiser. He estimated alcoholic beverage sales at the Fairfax store to make up about two percent of sales, or about \$40,000, and estimated that the larger Wilshire store might make about \$80,000 in alcoholic beverage sales.

³The "cork" wines, he explained, are sealed with corks rather than screw tops and they are dry (non-sweet) wines, containing 13 percent or less alcohol; the fortified wines are sweet and contain from 16 to 20 percent alcohol.

Subsequent to the hearing, the Department issued its decision which determined that transfer of the license would be contrary to public welfare and morals because normal operation of the proposed premises will interfere with the quiet enjoyment of their property by nearby residents, will create a crime problem in the immediate vicinity of the premises, and will create littering and loitering problems. The protests were, therefore, sustained.

Appellant thereafter filed a timely notice of appeal in which it contends that there is not substantial evidence to support the findings and the findings do not support the determinations.⁴

DISCUSSION

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 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

⁴Other than a one-paragraph procedural statement, the Department's brief states only: "After due consideration being given to both sides, the Department respectfully submits this matter to the Appeals Board for decision based on the record of the proceedings."

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].)

When, as in the instant matter, an appellant alleges that the findings of the Department are not supported by 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 reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

"Trial court findings must be supported by substantial evidence *on the record taken as a whole*. Substantial evidence is not [literally] *any* evidence--it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834, 865 P.2d 633], italics added.)

In the case of *Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer*, *supra*, 7 Cal.3d at page 441, the Supreme Court said that

the Department's role in evaluating an application . . . is to assure that public welfare and morals are preserved "from probable impairment in the future" [citation] . . . [and] in appraising the likelihood of future harm[,] . . . the Department must be guided to a large extent by past experience and the opinions of experts.

At the beginning of the hearing in this matter, Administrative Law Judge (ALJ) Gruen stated that the grounds set forth in the protest, and thus, the issues to be

considered, were whether the normal operation of the business, if licensed, would interfere with the quiet enjoyment of their property by nearby residents, create a crime problem, or create litter and loitering problems. [RT 8.] However, the protest letter he said he was "paraphrasing," stated, in its entirety:

We are responding to the notice filed by the 99 Cents Only Store on Wilshire Blvd. and Fairfax requesting a transfer of their wine and beer license.

We are firmly opposed to that request because we believe that it will attract the "wrong" customers to our neighborhood which has gone through a positive change in the past few years. What kind of people will buy a 99 cents bottle of wine or beer except for the "wrong" kind of people? We want to keep our neighborhood safe for our families. All our neighbors are concerned about this matter and they believe that such a request is not in the best interest of our community.

We hope that this letter will help in our continuing struggle to keep our neighborhood the way it is.

In other words, it appears that the ALJ "manufactured" the grounds for the protest.⁵ Appellant's representative, Miller, asked if the ALJ could repeat the issues so he could write them down. The ALJ repeated what he had said, and asked if Miller had received a copy of the protest letter, indicating that he was just "paraphrasing" from the letter, and implying that the applicant should have known what the issues were from the protest letter. We are of the opinion that no one would have guessed that the protest letter raised the issues as stated by the ALJ.

In his decision, the ALJ noted the conditions appellant agreed to in its petition for a conditional license (Finding 1) and described the location, hours, and other

⁵It is ironic that, just after "paraphrasing" the grounds for the protest, the ALJ said, "That's the issues, because basically this is a fair-notice hearing. You don't have a crack at people based on surprise issues that you raise at the last minute." [RT 10.]

background information regarding the Wilshire store (Findings 2 and 3). We set forth the remaining findings in full:

4. The proposed premises is located in a census tract in the [sic] Los Angeles County, which based on population, two off-sale licenses are permitted and only one exists.^[6]

5. The proposed premises is located in the Los Angeles Police Reporting District #721 which has 171 reported crimes while the average number of reported crimes in city-wide reporting districts is 313. District #721 does not have a 20 percent greater number of reported crimes than the city-wide average.

Local police officials are reported to have no objection to the issuance of the license.

6. The area to the north and south of Wilshire Boulevard is residential in nature. The residences include large and small apartment buildings, as well as condominiums.

7. There are 34 residential dwellings within 100 feet of the proposed premises. No protests were received from any of these residents. Protestants Benchanans reside in an owned duplex at 6207 Orange Street, approximately 250 feet north of the proposed premises. It has been their home for the past 21 years. Protestant Cefalu and his wife reside at 6206-1/2 Orange Street in an owned fourplex for the past 21 years.

They complain that since the advent of the 99 Cents Only Store on Fairfax, they have experienced severe problems relating to traffic congestion and panhandling transients consuming alcoholic beverages purchased at the Fairfax store.

8. The Protestants complain that traffic congestion problems already exist at the Wilshire store in respect to patron vehicles entering and exiting the premises' parking lot on Orange Street behind the store. The parking lot appears to be a choke point causing traffic to back up in both direction[s] as far away as Fairfax Avenue to the east. Protestants need to use detours to avoid heavy traffic in the area. The problem is compounded by the heavy concentration of apartment dwellings on Orange Street, a shortage of on-street parking and only

⁶He did not state, however, that the only license existing in the census tract is that of the Fairfax store, and that transferring the license to the Wilshire store would not increase the number of licenses in the census tract.

one lane for traffic in each direction. Protestant [sic] recommend that the Applicant employ a full time traffic monitor for its parking lot as a solution to the problem. The Applicant is reluctant to do so.

9. Transients hang-out in the immediate vicinity of the Fairfax store, chronically annoy pedestrians and are observed to be passed-out on nearby public sidewalks. They purchase beer and wine for 99 cents and are observed to drink from wine or beer containers held in bags identified by the logo of the 99 Cents Store. They litter the area. Protestants fear the transfer of the license will aggravate the problem because of the likely doubling of volume of liquor sales at the Wilshire store. Complaints to the police department are reported to have fallen on deaf ears.

10. Domestic and imported beer is sold at the Fairfax store, as well as wine in bottles. The beer is sold in either six or two-packs; however, since the price for all these products is 99 cents, regardless of the size, their availability to panhandlers would appear to be without limit. This has created a problem for the Protestants in the area, which they cannot reasonably be expected to endure and will be aggravated by the probable doubling of the sales of alcohol at the Wilshire store, if licensed.

11. Under Department Rule 61.4, the Applicant carries the burden to establish that the operation of the premises would not interfere with the quiet enjoyment of the property by residents in respect to residential dwellings within 100 feet of the proposed premises. This it has failed to do. The undersigned is frankly impressed with Mr. Gold, the CEO of the Applicant, who testified in the matter. He is a sincere, dedicated individual. Unfortunately, the panhandling/drinking problem cannot be effectively addressed short of denial of the transfer. The problem will still remain at the Fairfax store, but perhaps to a lesser extent. Beyond that, the problem properly lies with local law enforcement authorities.

Our review of the record finds no support in the record for many of the statements in Findings 8, 9, 10, and 11, which appear to be the primary bases for the determinations made by the ALJ. In addition, the ALJ does not appear to have included in his consideration aspects of those issues that were favorable to appellant.

Finding 8 talks about the "traffic problem," calling the Wilshire store's parking lot "a choke point causing traffic to back up in both direction [sic] as far away as Fairfax Avenue to the east." The traffic backed up "as far away as Fairfax Avenue" was only

backed up four or five car lengths, since that is how far Mrs. Benchanan said the entrance to the parking lot was from Fairfax. Mrs. Benchanan's testimony about backed-up traffic was that she had seen "about one or two cars" backed up on Fairfax Avenue, waiting to turn onto Orange Street. [RT 124.] We could find no testimony regarding traffic backing up in both directions on Orange Street.

The finding fails to mention that appellant has taken over an additional parking lot for use by its customers, or that there is another entrance to the parking lot from an alley that is accessed from Wilshire Boulevard. The ALJ also mischaracterized Gold's testimony when he said that the applicant was "reluctant" to hire a traffic monitor; Gold's response, when asked by the ALJ if he would be willing to hire a full-time monitor for the parking lot during the hours the store is open, was "I don't know." [RT 170.] Given that applicant had no notice that any "traffic problem" was to be an issue at the hearing, it is not surprising that Gold was unable to be more definite in his response.

Finding 9 deals with the "transient problem." The testimony on this issue was as follows:

– Mrs. Benchanan testified that "We have seen a lot of bad people hanging around" the Fairfax store. [RT 109.] She admitted that she did not know if they bought alcoholic beverages there, if they had alcoholic beverages in any of the bags that they carried, or if she had seen anybody drinking alcoholic beverages. [RT 109, 118, 119.]

– Cefalu testified that the crime rate 10 or 15 years before was "immense," but since they established a Neighborhood Watch program 20 years ago, the crime rate "went down through the cellar." [RT 128-129.] He also testified that there had "never been a transient problem like there is today, because of their store," and that the problem started when the Fairfax store opened. [RT 127-128.] A few minutes later, he

testified that the problem began "all of [a] sudden," three or four years before the date of the hearing, which he said was about a year after the store opened,⁷ and that during that time, he had seen transients drinking "at least 50" times. [RT 131-132.]

– Cefalu also said there were "lots and lots" of complaints about transients and panhandling that were made to the Wilshire division police station. [RT 130.] He testified that he had "seen everything from fights to panhandling to people just passed out on the streets, passed out like skid row on Fairfax right outside their store. You have to step over them. And if you walk down the street, you get approached and panhandled and asked for money" [RT 132.] When asked by the ALJ about the panhandlers drinking alcoholic beverages, he said "I can only assume that they're drinking alcohol." [RT 133.] Cefalu said that he had seen beer cans and beer and wine bottles (although he did not specify where he had seen them), and had seen people in front of a restaurant near the Fairfax store "Drinking, loitering, passed out." [Ibid.] When asked how he knew they got the alcoholic beverages from the Fairfax 99 Cents Only Store, Cefalu responded, "I can only assume." [RT 132.]

In all this testimony, we can see no evidence in support of the statements in Finding 9 that transients "chronically annoy pedestrians"; that they purchase beer and wine for 99 cents and drink from wine and beer containers held in 99 Cents Only Store bags; that they litter the area; or that complaints to the police fall "on deaf ears." In other words, there is not substantial evidence to support this finding.

The first sentence and part of the second in Finding 10 have some support in the record, but the statements that beer and wine from the Fairfax store appear to be

⁷The Fairfax store had been open, with its license, for about 13 years at the time of the hearing. [RT 153.]

available to panhandlers "without limit" and that this has created a problem in the area, are unsupported inferences. First, the statements ignore the evidence that beer and wine are not available at the store on a daily basis, but only intermittently, when appellant is able to obtain quality beer or wine at a bargain price.⁸ Secondly, the statements assume a fact not established in the record: that panhandlers obtain alcoholic beverages from the Fairfax store. Both of the protestants who testified in this regard said only that they "assumed" the transients had alcoholic beverages in their bags and they "assumed" any such beverages had been purchased at the Fairfax store. This Board must accept all reasonable inferences supporting the Department's decision; these inferences are not reasonable, based on the evidence in the record.

Finding 11 begins by stating that the applicant bears the burden of proving that operation of the business will not unreasonably interfere with the quiet enjoyment of their property by residents living within 100 feet of the Wilshire store. The next sentence states flatly that appellant has not done so. The finding concludes by stating that the "panhandling/drinking problem cannot be effectively addressed short of denial of the transfer." No connection is made, however, between the first part of the finding and the second, and we do not find it to be obvious. The decision does not state what it is that will interfere with the neighbors' enjoyment of their property. Without some explanation, we cannot say that this finding supports the decision.

We also find disturbing the ALJ's failure to consider imposing additional conditions to address whatever problem the ALJ thought would interfere with quiet

⁸At the time of the hearing, no beer or wine was carried in any of the 99 Cents Only Store stores. [RT 158.]

enjoyment. 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."

Here, although the subject was mentioned several times in the course of the hearing, and Department counsel specifically invited the ALJ to propose some additional conditions to address the issues raised, there is no mention of the effect of the conditions already agreed to by the applicant, the ALJ did not propose any additional conditions in the decision, and he did not ask the Department to use its expertise to craft conditions appropriate to whatever problem the ALJ saw. In this, we see confirmation of our belief that the Department acted arbitrarily and unreasonably in adopting the ALJ's decision.

The ALJ did not explain the basis for his determination that "normal operation of the premises will create a crime problem in the immediate vicinity of the premises." (Determination of Issues 2.) The only possible finding supporting this would be that transients litter. (Finding 9.) As noted above, we can find no evidence to support that finding. The ALJ found that the reporting district "does not have a 20 percent greater number of reported crimes than the city-wide average" and the local police have no objection to issuance of the license. (Finding 5.) In fact, the evidence shows that the area has a crime rate that is only about half the city-wide average, and the Department investigator reported that the local police vice officer said that neither the Wilshire store

nor the Fairfax store presented any law enforcement problem. We can only conclude that Determination 2 is unreasonable and arbitrary.

Determination of Issues 3, that "[t]ransfer of the license will create littering and loitering problems in the immediate vicinity of the premises," has defects similar to those described above with relation to Determination of Issues 2. There are no findings at all regarding loitering. As pointed out by counsel for the Department in closing argument, there was no testimony regarding loitering in the area under the control of the licensee, and that is the only area where the Department can reasonably expect a licensee to prevent or eliminate loitering. As noted above, the evidence does not support the finding about littering. In addition, littering is addressed in the conditions that would attach to the license. This determination is also unreasonable and arbitrary.

We are somewhat mystified by the Department's adoption of the ALJ's decision in this case. It takes no more than the most cursory of reviews to see the patent defects in the findings, the determinations, and the ultimate decision. The applicant was obviously prejudiced by the lack of notice regarding the issues to be presented at the hearing.⁹ The ALJ relied on wholly unsupported, non-specific allegations, and apparently bolstered them in reaching his decision by his own embellishments. This decision is unreasonable and an abuse of the Department's discretion.

⁹It was not just the applicant who was surprised by issues raised at the hearing. Counsel for the Department pointed out in closing argument that, in its investigation, the Department had not focused on the traffic concerns expressed by the protestants at the hearing, because it was not mentioned in the protest letter. Neither the Department nor the applicant could have known that it was an issue. This was not fairly noticed.

ORDER

The decision of the Department is reversed and remanded to the Department for further proceedings consistent with this opinion.¹⁰

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

¹⁰This 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.