

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

AB-7982

File: 48-379062 Reg: 02052190

DAVID STEARNS,
Protestant

v.

TIMOTHY STROUD,
dba Gold Rush Casino Resort
1750A El Camino Real, Grover Beach, CA 93433
Applicant/Respondent

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 16, 2003

Following an administrative hearing held on March 13, 2002, the Department overruled all protests which had not been abandoned, and ordered the issuance of an on-sale general public premises license, with conditions, to applicant Timothy Stroud.¹ Protestant David Stearns (appellant), has now appealed, and contends that the license should not have issued.

Appearances on appeal include protestant David Stearns, appearing through his counsel, David Weilbacher;² applicant Timothy Stroud, appearing through his counsel,

¹ A copy of the Department's decision, dated May 9, 2002, is set forth in the appendix.

² The Administrative law Judge (ALJ) appeared to be of the impression that Weilbacher was himself a protestant as well as the attorney for appellant Stearns. However, an exchange of correspondence between Weilbacher and the Department

John W. Fricks; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Timothy Stroud (hereinafter "Stroud" or "applicant") petitioned for a person to person, premises to premises, transfer of an on-sale general public premises license for a card room he intends to operate in a single story, free standing building located on the southwest corner of Oak Park and El Camino Real in the city of Grover Beach. The premises were previously licensed with an off-sale beer and wine license. The petition set forth nine conditions which would be imposed on the license if issued:

1. *The Petitioner(s) shall post and maintain a professional quality sign facing the premises parking lot(s) that reads as follows:*

**NO LOITERING, NO LITTERING
NO DRINKING OF ALCOHOLIC BEVERAGES**

VIOLATORS ARE SUBJECT TO ARREST

The sign shall be at least two feet square with two inch block lettering. The sign shall be in English and Spanish.

2. *No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee(s) as depicted on the ABC-257 dated 7-26-01.*
3. *Sales, service or consumption of alcoholic beverages shall be permitted only between the hours of 10:00 a.m. to 10:00 p.m. each day of the week.*
4. *The petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control, as depicted on the ABC-257 dated 7-26-01.*
5. *Petitioner(s) shall police the area under their control once an hour in an effort to prevent the loitering of persons about the premises as depicted on ABC-257, dated 7-26-01.*

indicates that Weilbacher's protest was disallowed as untimely filed. Whether or not a protestant, his views are undoubtedly reflected in the brief filed on behalf of his client.

6. *The sale of alcoholic beverages for consumption off the premises is strictly prohibited.*

7. *The parking lot of the premises shall be equipped with lighting of sufficient power to illuminate and make easily discernible the appearance and conduct of all persons on or about the parking lot. Additionally, the position of such lighting shall not disturb the normal privacy and use of any neighboring residences.*

8. *Petitioner shall provide one (1) uniformed security guard between the hours of 5:00 p.m. and 2:00 a.m.*

9. *Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 7-26-01.*

Eighty-seven protests were filed against the license. Of those, 17 protestants, including appellant Stearns, appeared in person or were represented by others at the hearing. All of the other protests were deemed abandoned. Following the administrative hearing, the ALJ issued a proposed decision, which the Department adopted without change, which rejected the remaining protests and determined that the license, as conditioned, should issue. Appellant Stearns is the only protestant who has appealed.³

The ALJ concluded that the evidence did not establish that issuance of the license would result in or add to undue concentration of licenses; interfere with the quiet enjoyment of residents; create or aggravate an existing law enforcement problem; or result in a license being issued for a premises not properly zoned for such a license.

Appellant raises numerous issues, under four broad headings: the hearing violated appellant's due process rights; the Department's investigation was deficient; by allowing a conditional license, the Department expanded gambling beyond the city's

³ Appellant Stearns operates an existing card room in the City of Grover Beach, and is of the view that the market will support only one card room. Stearns holds an on-sale general public eating place license.

statutory restrictions, thus violating the Gambling Control Act; and, that the applicant's definition of a restaurant conflicts with the Department's statutory definition of a restaurant. Appellant has not contested the ALJ's findings and determinations regarding the substantive issues raised in the protests except with respect to the zoning issue.

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 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.⁴

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 Bev. Control App. Bd.*

⁴The 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].

(1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which 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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

DISCUSSION

I

Appellant has asserted a number of unrelated contentions in support of his broad claim that his due process rights were violated. We have reviewed each of those claims, and have concluded that none has substance.

The challenge to Exhibit 3.

Appellant claims that Exhibit 3, a memorandum dated October 16, 2001, from Susan Clark, Assistant Planning Director, City of Grover Beach, to Robert Olshaskie, the Department investigator who conducted the investigation concerning the license application, should have been produced in response to his request for discovery, a request the Department said it had never received. Appellant also claims that Exhibit 3 was improperly admitted in evidence despite the fact that it had not been authenticated.

We have a serious question whether appellant is in a position to raise a discovery issue. As the applicant's brief points out, the letters appellant claims were written to the Department were not placed in evidence.⁵ Appellant's attorney made a passing reference to a request for discovery, but made no attempt to document it or

⁵ The first indication of any letters requesting discovery was as part of the appellant's request for reconsideration of its decision by the Department. Appellant's attorney was advised by the Department's general counsel that the letters had not been received by the Department.

further pursue the issue in the course of the hearing. Despite the doubts, we have considered appellant's contentions, and find them lacking in merit.

Exhibit 3 discusses the zoning requirements of the City of Grover Beach with respect to the availability of food at the premises of the proposed licensee. The memorandum acknowledges the fact that the license sought is not burdened by a requirement that food be offered. Exhibit 3 was admitted only as administrative hearsay, supplementing the investigator's testimony with respect to the city's zoning requirements.

Appellant says the document is significant because the ALJ criticized him for not having the author of the memorandum at the hearing.

The ALJ's so-called "criticism" could better be described as his impatience in response to appellant's counsel's confusion regarding whether the applicant should be subject to the same food service requirements as his client. We agree with the sentiment expressed by the ALJ that the exhibit itself was of little significance (see RT 103-106), and do not believe appellant suffered any real prejudice by not having the exhibit until the hearing.

We also believe that the discrepancy in the address of the proposed premises contained in Exhibit 3 is inconsequential. The proposed premises are in the same parcel of real estate, and it seems clear that the author of the memorandum was familiar with the property which was the subject of his memorandum. This is hardly a due process issue.

Complaint of lack of notice that conditional license sought

Appellant asserts that it was unfair to the protestants who attended the hearing,

as well as those who did not, that they were not informed that the original application had been denied, and that the hearing dealt with applicant's petition for a conditional license. Applicant and the Department both contend that there is no record support for the assertion that the original application was denied.

We do not see how appellant was prejudiced by the fact that the hearing dealt with the question whether a license more restrictive than the license originally sought should issue. Each of the conditions in question is of the kind the Department commonly utilizes to reduce or eliminate the impact a licensed premises may have on the surrounding community, and does nothing to diminish the rights of any protestant.

Appellant's ability to mount opposition to the license was in no way impaired by the addition of conditions designed to add additional protections of welfare and morals beyond those afforded by the law generally. The fact that a protestant other than appellant was curious why a condition was added requiring the applicant to take steps to discourage loitering does not strike us as a reason to question the decision.

Appellant's complaints about the conduct of the hearing.

Appellant also complains that he was not provided a copy of the investigator's report prior to the hearing; that the hearing was not held in the city where the premises are located; that some protestants could not hear the proceedings; that the ALJ did not allow some protestants' question; and that the ALJ improperly placed the burden on appellants to show that "the State definition of restaurant" was the same as that of the City of Grover Beach. None of these contentions has merit.

We get the impression from the record that appellant Stearns was aware at all times of the progress of the investigation, interested as he was in opposing applicant's efforts to start a competing business. [See Rt 70-71]. Again, without a record basis for

having formally requested the investigator's report, he is not in a position to complain. (See page 5, *supra*.)

It is apparent from the record that the hearing room was crowded and the acoustics poor. It is understandable, in such circumstances, that some people in the room might not hear everything said, and that some questions might have gone unheard or unanswered, despite the ALJ's efforts to deal with the problems associated with the hearing room. However, appellants have not persuaded us that the ALJ did not conduct a fair and adequate hearing under the circumstances.

That the hearing was held in neighboring Arroyo Grande rather than Grover Beach is immaterial. (See Government Code section 11508, subdivisions (b) and (c).)

Finally, the claim by appellant that the ALJ placed an improper burden on him to prove the way the State of California and the City of Grover Beach define the term "restaurant" misstates the problem.

The fundamental flaw in appellant's position is reflected in his brief. He there set forth the text of Business and Professions Code section 23038, which spells out the obligations of a holder of a bona fide public eating place license with respect to meal service, kitchen facilities, and the like, and contrasts those requirements with the much more liberal requirements of the City of Grover Beach with respect to what will satisfy it with respect to food service. Appellant seems to believe that the license applicant has sought should not issue either because the applicant cannot meet the standards contained in section 23038, or because its issuance would violate the city's zoning law.

But the applicant has not sought a bona fide public eating place license, the kind of license to which section 23038 applies. His application is for an on-sale general public premises license, one which does not require any food service whatsoever. The

only food service which would be required in the operation of his business is what is required by the City of Grover Beach. If the city believes this requirement can be met with salads and sandwiches, that is enough. It is irrelevant that salads and sandwiches alone would not satisfy the requirements of the Department of Alcoholic Beverage Control for another type of license.

The ALJ saw the problem, even if appellant could not, when he said (RT 103):

Counsel, I believe you're going to confuse the record, because if we were dealing with an application for an eating establishment, an application with the Department of Alcoholic Beverage Control for an eating establishment, the Department of Alcoholic Beverage Control, a state agency, has certain requirements that need to be met. We are not dealing with that sort of license. Therefore, the definition that the state agency might put on an eating establishment is irrelevant. You're raising an issue of city zoning and what they require by way of food.

Our review of the record convinces us that appellant's concerns over what obligations there may be upon the applicant with respect to food service were explored at length, and that the ALJ's treatment of this issue was well within the discretion afforded him.

Similarly, the granting by the Department of an alcoholic beverage license which does not require food service does not violate a city licensing ordinance which may contain such a requirement. The applicant must still comply with the city's requirements with respect to food service. What those requirements are is not a concern of the Department.

II

Appellant contends that the Department's investigation of the application was deficient because the investigator, who had already contacted the police about the application, did not contact them a second time after the petition for conditional license

was filed. In addition, appellant contends that the investigator spoke to the city staff about zoning but did not himself review the city's zoning law.

The Department investigator testified that he spoke with the police chief and a police sergeant and was advised the police had no objections to the issuance of the license. The argument that they should have again been consulted simply because the license which might issue would be even more restrictive than the law requires strikes us as ludicrous.

Appellant's argument that the investigator should have made his own determination whether the city zoning laws precluded the issuance of a license is not persuasive. The investigator was entitled to rely on the interpretations of the zoning law given him by the people who are charged with administering those laws, in this case, the city attorney and the assistant planning director. [See RT 18-20.]

Appellant's suggestion that the Department lacked the ability to make any determination how the added conditions would affect public safety ignores the Departments' broad and long experience in regulating alcoholic beverage licensees.

III

Labeling the issue "Conflict of Laws," appellant contends that the Department, by allowing a "conditional" license as opposed to a "standard" or "normal" alcoholic beverage license, has somehow expanded gambling beyond what the city permits, in violation of the Gambling Control Act.

Appellant quotes language from Business and Professions Code section 19961, subdivision (a),⁶ which requires that any amendment to any city or county ordinance

⁶ Appellant has incorrectly cited this provision as section 19980.1 and 19950.1.

which would result in an expansion of gambling be submitted for voter approval.

It is appellant's theory that the Department's issuance of a license which does not require the licensee to operate a restaurant is somehow the equivalent of an amendment to an ordinance of the city.

This contention suffers from the same defect which was discussed earlier. Appellant seems to believe that the City of Grover Beach and the Department must agree upon a definition of the term "restaurant," and that the Department cannot issue a license to an applicant in Grover Beach who intends to operate a card room unless the applicant offers the food service and maintains the kitchen facilities set forth in Business and Professions Code section 23038.

Whether applicant's intention to offer salads and sandwiches satisfies the zoning requirements of the City of Grover Beach is a matter to be resolved between the applicant and the city. It is not a matter of concern for the Department.

Similarly, what the city requires from protestant Stearns in the way of food is a matter between protestant Stearns and the city, and what the Department requires from protestant Stearns in the way of food is, by virtue of the kind of license Stearns holds, a matter between Stearns and the Department.

Protestant Stearns testified that he does not have a restaurant as part of his premises, but relies on food obtained by an adjacent restaurant through a pass-through window. Under the type of license he has, minors may enter the premises, unless prohibited by some law other than in the Alcoholic Beverage Control Act, while minors are barred from the premises operated under the type of license sought by applicant Stroud.

This Board is satisfied, from its review of the record and analysis of the issues

raised by the protestant, that the Department acted well within the discretion granted it by law.

ORDER

The decision of the Department is affirmed.⁷

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

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.