

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

AB-8143

File: 48-391503 Reg: 03054268

JAMES LISSNER, Appellant/Protestant

v.

THE PITCHER HOUSE dba The Pitcher House
142 Pacific Coast Highway, Hermosa Beach, CA 90266
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent.

Administrative Law Judge at the Dept. Hearing: John P. McCarthy
Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 17, 2004

James Lissner, (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of The Pitcher House, doing business as The Pitcher House (respondent/applicant), for an on-sale general public premises license.

Appearances on appeal include appellant/protestant James Lissner, representing himself; respondent/applicant The Pitcher House, appearing through its president, Gary Cullen; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Applicant applied for the issuance of an on-sale general public premises license

¹The decision of the Department, dated May 1, 2003, is set forth in the appendix.

in August 2002. The Department investigator recommended that the license be issued, but protests were filed by protestant and another Hermosa Beach resident. Appellant petitioned for a conditional license on December 20, 2002. An interim permit was issued on December 31, 2002, with a condition that entertainment provided shall not be audible beyond the property under the control of the licensee.

An administrative hearing was held on applicant's petition on March 25, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Margaret Hoffman, the Department investigator who conducted the investigation of the application in question; by Gary Cullen, the president of the applicant; by Michael Moretti, Piper Layton, and James Lissner in opposition to the application; and by Steven Davis, applicant's manager, in support of the application.

Subsequent to the hearing, the Department issued its decision which overruled appellant's protest, dismissed the protests of the other protestant, who did not appear, and allowed the license to issue.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the determination of the administrative law judge (ALJ) that issuance of the license would not result in or add to undue concentration of licenses is not supported by the findings, and the findings are not supported by the record; (2) the ALJ failed to make a determination of public convenience or necessity; and (3) the decision deprives protestant of due process. The first two issues will be discussed together.

DISCUSSION

I

Protestant Lissner contends that the ALJ 's determination that issuance of the

license would not result in or add to undue concentration is contrary to law in that it is based upon a misstatement of the law and not supported by the findings. Protestant Lissner further contends that the decision is contrary to law because the ALJ failed to make a determination of public convenience or necessity.

Protestant Lissner points to Conclusion of Law 8 and criticizes the absence of any discussion as to how the ALJ's use of the word "create," in that conclusion, is equivalent to "result in," the words used in Business and Professions Code section 23958.

Section 23958 provides that the Department "shall deny an application for a license if issuance . . . would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." The Department may issue a license in spite of the existence of undue concentration "if the applicant shows that public convenience or necessity would be served by the issuance." (Bus. & Prof. Code, §23958.4, subd. (b)(1).)

Under the facts of this case, it was not necessary for applicant to prove that issuance of the license would serve public convenience or necessity. That proof is required only where issuance of the license would result in or add to an undue concentration of licenses. Because appellant already holds an on-sale retail license (type 42) at the premises, and that license would be surrendered to the Department simultaneously with the issuance of the type 48 license to appellant, issuance of the type 48 license would cause no change in the number of on-sale retail licenses in the census tract. Therefore, section 25658 would not be a basis for denial of the license and the public convenience or necessity exception to section 25658 is not necessary. (*Lissner v. Miller* (2002) AB-7816; *Dahdah Trading Corporation* (1999) AB-7304.)

It was not necessary for the decision to include a specific discussion or determination regarding public convenience or necessity under these circumstances. Nor do we think the ALJ's use of the word "create" rather than "result in" is of any significance.

II

Protestant contends the decision deprives him and the community of their right to due process and is contrary to public welfare and morals. The decision violates due process, according to protestant, because, once the license is issued, conditions can be removed without notice to the public and an opportunity for objections to be heard. It is contrary to public welfare and morals, protestant argues, because there is nothing to prevent removal of the condition controlling noise from entertainment after the license is issued, even though the ALJ found that it would be contrary to public welfare and morals for the license to issue without that condition.

Protestant is arguing about something that has not happened yet and may never happen. In any case, notice is provided to the community, at least technically, because section 23803 provides that written notice of the intention to remove or modify a condition must be given to "the local governing body of the area in which the premises are located." This body then has 30 days to object to the modification or removal of the condition, and, if an objection is filed, the Department must hold a hearing. Protestant's remedy then, lies with the local governing body.

The Board has previously rejected this due process argument in several of protestant's earlier appeals. (See, e.g., *Lissner v. Miller* (2002) AB-7816; *Lissner v. Pierview, LLC* (2001) AB-7650.) No evidence or argument has been presented that would cause us to decide this matter differently.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS

² 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.