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

AB-8162
File: 47-381096 Reg: 03054587

TINA VELASCO and EFREN VELASCO dba Casa Castillo
54311 Road 432, Bass Lake, CA 93604,
Appellants/Licensees

v.

GENE BAKER, et al.,
Protestants/Respondents,

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Denny R. Davis

Appeals Board Hearing: March 11, 2003
San Francisco, CA

ISSUED MAY 12, 2004

Tina Velasco and Efren Velasco, doing business as Casa Castillo (appellants/applicants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application for an on-sale general public eating place license for premises to be constructed in Bass Lake, California.

Appearances on appeal include appellants/applicants Tina Velasco and Efren Velasco, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon; respondents/protestants Gene Baker, Dennis Marquardt, Jonnie Baker, Wally Kinchen, and Tracy Hearnsberger, appearing through their representative, Wally

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[1]The decision of the Department, dated June 19, 2003, is set forth in the appendix.

Kinchen; and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

In December 2001, appellants/applicants ("appellants") applied for an on-sale general public eating place license to be utilized in a Mexican-style restaurant in Bass Lake, California. The business would be housed in a structure then under construction in a mixed commercial-residential zone. Following the filing of protests and an investigation by the Department, the application was denied. According to the Notice of Denial, issuance of the license would be contrary to welfare and morals within the meaning and intent of article XX, section 22 of the California Constitution, sections 23001 and 23958 of the ABC Act (Business and Professions Code sections 23001 and 23958), and Department Rule 61.4. The Statement of Issues which accompanied the Notice of Denial also referred to Rule 61.4, and listed two residences within 100 feet of the proposed premises and one residence within 150 feet.

Appellants thereafter petitioned for a hearing on their application, and shortly before the hearing, filed a petition for conditional license containing a number of recitals and seven conditions addressing the location of residences within 100 feet of the premises, the location of a church within 600 feet, and an undue concentration of licenses.

At the commencement of the hearing, Department counsel advised the administrative law judge (ALJ) that "the only reason on which the Department recommended denial of the application was on the basis of its interference with the

quiet enjoyment of the nearby residences." [RT 9.] His statement appears to have been consistent with the Notice of Denial, as clarified by the Statement of Issues.

The proposed decision of the ALJ, which the Department adopted, denied the application on two grounds: appellants failed to sustain their burden of proof under Rule 61.4 that operation of the proposed premises would not interfere with the quiet enjoyment of the residences located within 100 feet of the proposed premises, and failed to establish that "operation" of the premises "would not result in an undue concentration [of licenses] within the meaning of Business and Professions Code section 23958.4."

Appellants have filed a timely appeal from the Department's decision, and challenge each of the grounds of the decision.

DISCUSSION

I

Department Rule 61.4 (4 Cal. Code Regs., §61.4) provides, in substance, that the Department may not issue a license for a premises that will be located within 100 feet of a residence unless the applicant can establish that the operation of the business will not interfere with the quiet enjoyment of the property by the residents. The rule effectively places the burden of proof on the issue of interference with quiet enjoyment on the applicants. The hearing in this case was conducted on that premise, and the administrative law judge concluded that the applicant had failed to meet that burden.

Appellants now assert that they met that burden, and that the Department gave insufficient consideration to the imposition of conditions on any license which might

issue to eliminate or alleviate the concerns of the protestants.

The Department has a broad discretion with respect to the issuance or denial of a license. In *Koss v. Department of Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219], that discretion was described this way:

> [T]he Department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. If the decision is reached without reason under the evidence, the action of the Department is arbitrary, constitutes an abuse of discretion, and may be set aside. Where the decision is the subject of a choice within reason, the Department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals Board or the court may not interfere therewith.

The question that *Koss* leaves the Board to address, then, is whether the decision was reached within reason under the evidence.

The proximity of two residences within 100 feet of the proposed premises is not in dispute. One residence is located within 15 feet of the structure, another within 30 feet. Of course, if proximity alone were controlling, there would be no reason for that portion of the rule permitting an applicant an opportunity to demonstrate non-interference with quiet enjoyment. Yet, as we read the decision, it appears to be based on proximity alone.

We are unable to tell what the ALJ considered in determining that appellants had failed to demonstrate that the operation of their restaurant would not interfere with residential quiet enjoyment. Although he concluded that appellants did not show that issuance of the license would not interfere with the quiet enjoyment of "surrounding" or "adjoining" properties, he did not explain why they failed to do so.

Importantly, the decision makes no reference whatsoever to the appellants' petition for a conditional license. (Exhibit 4.) The document, prepared by the

Department investigator [RT 44], contained several conditions intended to eliminate or alleviate the concerns of the nearby residents, including a ban on live entertainment and amplified music, a ban on any amplifying system on the patio, and a requirement that gross sales of alcohol not exceed the gross sales of food. In addition, sales of alcoholic beverages would not be permitted after 10 p.m., appellants could not operate as, or apply for a license to operate, a public premises, and the sale of alcoholic beverages for off-premises consumption would be prohibited.

It is not up to this Board to say that the conditions contained in the petition for conditional license, or others which might be imposed, would provide complete or even adequate protection for the residents located within 100 feet of the premises. We know that the premises are located in an area zoned for commercial use, and we know also that the operation of a restaurant, even without the sale of alcoholic beverages is bound to have some effect on noise and traffic in the neighborhood. We are simply not in a position to assess the potential effectiveness of the conditions in the petition for conditional license. Such an assessment is well within the expertise of the Department. However, we believe that the failure of the ALJ to even consider the potential impact of these conditions on the concerns of the residents renders the decision arbitrary.

What this Board said in *Summit Energy Corporation* (2001) AB-7575, should be said here:

> The rule simply shifts the burden of proof on the question of interference to the appellant. It does not, contrary to what the decision seems to suggest, create an absolute barrier to the issuance of a license, or deprive the Department of the discretion it has with respect to the issuance or denial of a license.
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> 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.

We cannot order the Department to issue a license. We can, however, and in this case we do, order the Department to reconsider its decision, taking into account all relevant considerations, including the conditions proposed in the petition for conditional license.

II

The decision included, as a second reason for sustaining the protests, the applicant's failure to establish that "operation" of the premises would not result in an undue concentration within the meaning of Business and Professions Code section 23958.4. Section 23958.4, in conjunction with section 23958, requires the Department to deny an application for a license where undue concentration, as defined in section 23958.4, exists. The statute creates an exception, however, where the local governing body has determined that public convenience or necessity would be served by the issuance of the license. In addition the statute provides that, in the absence of such a determination by the local governing body, the Department may issue a license if the applicant can show that public convenience would be served.

Appellants contend that the issue of undue concentration should not have been considered, because it was not a issue contained in the Statement of Issues. They further contend that the finding that appellants did not demonstrate public convenience or necessity is not only unsupported by the evidence, but contrary to the only evidence in the record.

At the outset of the hearing, and consistent with the Statement of Issues, Department counsel informed the ALJ that "the only reason on which the Department

recommended a denial of the application was on the basis of its interference with the quiet enjoyment of the neighbors." [RT 9.]

Nonetheless, Department counsel elicited testimony from the Department investigator to the effect that the proposed premises were located in a census tract containing eight licenses and which, according to the population of the tract, was entitled to only five. [RT 38.]. Thus, he stated, the applicants would have to show public convenience or necessity would be served. His testimony continued:

> Q. And did you make a determination as to whether there's public convenience or necessity?
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> A. Yes, I did.
>
> Q. And how did you do that?
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> A. I – Tina [the applicant] supplied a letter to the Department stating why her premises would serve a public convenience to the community or to the location, and I did find that she would be the only Mexican restaurant in the immediate Bass Lake area ... .
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> Q. And on that basis, did you determine that the restaurant having an alcoholic beverage would serve a public convenience to the community?
>
> A. Yes, I did.

There is other evidence which would support the investigator's determination that the applicant's restaurant would serve public convenience or necessity. The testimony indicated there were only two other places for visitors and residents to dine in Bass Lake. Bass Lake is a very popular summer resort area, with a large number of visitors.

The ALJ did not explain why he believed that public convenience or necessity had not been established, nor did he mention the Department investigator's finding to the contrary.

Thus, we think the ALJ erred in two respects; he rested his decision on an issue

not within the Statement of Issues, and he found, contrary to the evidence, that appellants had not met their burden on that issue.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be necessary and appropriate in light of our comments.[2]

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

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[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.