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

AB-8258
File: 47-396849 Reg: 03056046

CLINTON ALEXANDER, et al.,
Appellants/Protestants

v.

SANTA YNEZ BAND OF MISSION INDIANS,
dba The Chumash Casino and Resort
3400 East Highway 246, Santa Ynez, CA 93460
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 18, 2004

Clinton Alexander, Nicki Alexander, Phillip Alexander, M. Braun, Maryann Burris, Joseph A. Doherty, Gino Filippin, Linda Kastner, Edward L. Kushner, Kelly Maguire, Allen C. Moehle, Andrea Moehle, Heide J. Moir, Curtis Moniot, and David K. Watts (appellants/protestants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Santa Ynez Band of Mission Indians, doing business as The Chumash Casino and Resort (respondent/applicant), for an on-sale general public eating place license.

Appearances on appeal include appellants/protestants Clinton Alexander, et al., appearing through their counsel, Brenton L. Horner and Curtis W. Molloy;

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[1]The decision of the Department, dated February 20, 2004, is set forth in the appendix.

respondent/applicant Santa Ynez Band of Mission Indians, appearing through its counsel, Kathryn A. Ogas and Larry R. Stidham; and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Applicant petitioned for issuance of an on-sale general public eating place license. Protests were filed by appellants and others, and an administrative hearing was held on December 10 and 11, 2003. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Applicant, the Santa Ynez Band of Mission Indians, operates a casino and resort on tribal land in Santa Barbara County. It applied for a license to allow it to serve alcoholic beverages in a newly built restaurant on the third floor of the casino. The proposed premises consist of an indoor dining area, a lounge/waiting area, and an enclosed outdoor patio, with a total patron capacity of approximately 200. The intended hours of operation are from 5:00 p.m. to 10:00 p.m. Sunday through Thursday and from 5:00 p.m. to 11:00 p.m on Friday and Saturday.[2] The restaurant would serve American cuisine, and applicant does not intend to offer any entertainment in the premises.

The casino is in a rural area on a two-lane highway that has seen a substantial increase in traffic in recent years. No residences are within 100 feet of the premises. No schools or churches are located within 600 feet of the premises, but several schools and churches are within about one mile of the premises, and Santa Ynez Park is about 500 feet away on the other side of Highway 246. None of these entities filed protests.

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[2]Other portions of the casino, not included in the proposed premises, are open 24 hours a day.

Although 12 on-sale licenses are allowed based on the population in the census tract in which the proposed premises is located, 20 such licenses currently exist there. Three of the licensed premises are restricted to club members and their guests, and are not open to the public. The other 17 licenses are divided between the communities of Santa Ynez and Solvang. No licensed premises are located within 1000 feet of the proposed premises. The closest licensed restaurant is located in Santa Ynez, about a quarter of a mile away.

Subsequent to the hearing, the Department issued its decision which denied appellants' protests, dismissed the protests of other protestants who did not appear at the hearing, and allowed the license to issue with conditions.

Appellant thereafter filed an appeal making the following contentions: The findings that issuance of the license would serve public convenience or necessity, would not interfere with schools, churches, or parks, and would not create a public nuisance, are not supported by substantial evidence in light of the whole record; the administrative law judge erred by not granting protestants' request for a continuance; the findings of fact are not supported by the record; and the Department failed to conduct a thorough investigation as required by statute.

DISCUSSION

I

Appellants contend that substantial evidence does not support the findings that issuance of the license would serve public convenience or necessity, would not interfere with schools, churches, or parks, and would not create a public nuisance.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.*

(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].) When an appellant charges that the Department's findings are not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (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]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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].)

A. PUBLIC CONVENIENCE OR NECESSITY

Business and Professions Code section 23958 provides, in part, that the Department "shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." Subdivision (b) of section 23958.4 provides in pertinent part that, "[n]otwithstanding Section 23958,

the Department may issue a license . . . (1) . . . if the applicant shows that public convenience or necessity would be served by the issuance."

It is undisputed that the casino is located in an area of undue concentration: 12 on-sale licenses are allowed based on population, while there presently exist 20 on-sale licenses within the census tract. Protestants contend applicant failed to prove that public convenience or necessity would be served by issuing this license, and therefore, it does not qualify for the exemption provided in section 23958.4, subdivision (b).

Protestants argue that the Department should balance applicant's claim that public convenience or necessity would be served by issuance of the license against the "legitimate concerns and objections of Protestants." They assert the testimony showed that, rather than serving public convenience or necessity, issuance of this license would be detrimental to the community because it would: add to the undue concentration in the area; potentially increase crime, violence and other problems that are made worse by alcoholic beverage consumption; add to traffic congestion and accidents in the area; be in "close proximity to numerous schools, churches or parks; and damage "the quality and morals of a rural community."

Determination of Issues II concludes the evidence established that issuance of the license would serve public convenience or necessity, "as set forth in Finding IV." Finding IV first sets out the facts showing that an undue concentration of licenses exists in the census tract in which the casino is located and describes the nature and location of the other licensed on-sale premises in the census tract. Public convenience or necessity is discussed in part D of Finding IV:

> However, the evidence also established that the issuance of the applied-for license would serve public convenience or necessity. The Applicant submitted a letter dated February 6, 2003 indicating that it wanted to

> provide an establishment that would offer exceptional steak, chops and seafood at a fair price for all of its guests. The Department reviewed the Applicant's letter of public convenience or necessity, made a determination as to whether the letter was truthful and then looked to see whether there were any other factors that should be considered. In concluding that the issuance of the applied-for license would serve the public convenience or necessity, the Department considered the fact that there are no other licensed premises within 1,000 feet of the premises that hold an on-sale license, the fact that the closest licensed restaurant is located in the town of Santa Ynez approximately one quarter mile away and the fact that the Applicant's restaurant is unique in that it is located within a gaming casino unlike any other restaurant within the counties of Santa Barbara, San Luis Obispo and Ventura. Furthermore, [Department] Supervisor Macias pointed out that it is not unusual to issue an alcoholic beverage license even if there is an undue concentration of licenses in the census tract because public convenience or necessity looks at the whole picture and does not only consider the people in a particular census tract. Consideration is also given to the Applicant's clientele and to patrons who come from outside the census tract.

Appellants are really asking this Board to substitute its judgment of the evidence for that of the ALJ and the Department, something that the Appeals Board is not authorized to do. The fact that appellants may believe that public convenience or necessity would not be served by issuance of the license does not mean that the Department must defer to the protestants. When there are conflicting interests that must be balanced, the Appeals Board will generally uphold the Department's exercise of discretion in determining public convenience or necessity when issuance is beneficial to some, even if it might be adverse to others. (See *Lissner v. Hennessey's Tavern, Inc.* (1998) AB-6911; *Adcock v. Uthman* (1992) AB-6175.)

Appellants also assert that applicant had the burden of proving that public convenience or necessity would be served by issuance of the license and that applicant failed to carry that burden because it presented no evidence at the hearing. However, applicant met its burden of showing that public convenience or necessity would be served during the Department's investigation. The Department obviously was satisfied

that public convenience or necessity had been shown, since it was prepared to issue the license with conditions. Having established to the satisfaction of the Department that public convenience or necessity would be served by issuance of the license, applicant did not bear the affirmative burden of establishing it again at the hearing.

Had no protests been filed, the Department would have issued this license. The hearing was necessary only because of the allegations made in the protests. Therefore, it was the protestants who had the burden at the hearing of showing the allegations of the protests were true and that it would be an abuse of discretion for the Department to issue the license in light of those facts.

Appellants cite two cases in support of their contention that the applicant bears the burden of proof at the hearing: *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 259 [341 P.2d 291] and *Bakman v. Department of Transportation* (1979) 99 Cal.App.3d 665 [160 Cal. Rptr. 583]. *Martin* involved an applicant's appeal from the Department's denial of its license application. In *Bakman*, homeowners near the Fresno Air Terminal (FAT) intervened in the hearing on FAT's application for an amended airport permit. The court denied their petition for a writ of mandate requesting a new administrative hearing, in part because the issues they raised were beyond the scope of the application hearing. In both of these cases, the burden of proving the applicants qualified for the license or permit was properly placed on the applicants. Neither of these cases, however, involved a protest hearing such as that in the present matter.

Applicant elected to rely on the evidence that had already been presented, and it had no obligation to present its own independent evidence. Its failure to present

evidence in no way negates the remaining evidence which was sufficient to support the Department's decision.

The factors set out in Finding IV constitute substantial evidence in support of the conclusion that public convenience or necessity would be served by issuance of this license. We cannot say that the Department's finding was an abuse of discretion.

B. PUBLIC NUISANCE

Appellants also allege a lack of substantial evidence to support the finding that issuance of the license would not create a public nuisance. They argue that the evidence "clearly establish[ed] that an uncontroverted concern of Protestants was the likelihood that issuance of the license . . . would exacerbate problems already associated with Casino operations" and that they "introduced evidence demonstrating an explosive rise in traffic and criminal activity at and near the Chumash Casino and the Sheriff's Department's increasing difficulty responding to the increased crime." (App. Br. at p. 10.)

Appellants' argument is really directed against Finding of Fact III, which was the basis for the Department's determinations that issuance of the license would not tend to create a law enforcement problem in the area (Determination of Issues [Det.] I), nor would it result in a traffic problem or lead to an increase in traffic accidents (Det. III). Again, as with the issue of public convenience or necessity discussed above, appellants are really asking this Board to substitute its judgment of the evidence for that of the ALJ and the Department.

The protestants and their witnesses testified about their concerns with respect to law enforcement and traffic problems, which the ALJ agreed were legitimate concerns. (Determination I.) However, the Department's decision is based on evidence from the

Santa Barbara County Sheriff's Department (SBCSD) and the California Highway Patrol (CHP) contradicting or negating those concerns. This evidence included: the applicant's acceptance of seven conditions crafted by the SBCSD and the resultant withdrawing of the SBCSD's protest (Finding of Fact [FF] III-A&B); the testimony of SBCSD Commander Byrne indicating, among other things, that the SBCSD is still able to respond and provide the necessary services in the Santa Ynez Valley and that the SBCSD works closely with the Tribal Security Force (FF III-D); the CHP's position that it does not consider traffic collisions a significant problem in the area around the Casino (FF III-E); the applicant's voluntary payment for a CHP officer to be stationed at the Casino on weekends and during special events (FF III-F); the provisions in the Tribal-State Compact and license condition 6 that obligate the licensee to comply fully with and submit to inspection of the premises under Business and Professions Code section 25755 while exercising its license privileges (FF III-G); and appellant's agreement to conditions drafted by the Department restricting sale and consumption of alcoholic beverages to the restaurant, prohibiting alcoholic beverage sales "to go," requiring that gross sales of alcoholic beverages not exceed gross sales of food, and requiring sufficient lighting in the parking lot (FF III-H).

The factors considered by the Department constitute substantial evidence supporting the determinations that issuance of the license would not create law enforcement or traffic problems.

C. SCHOOLS, CHURCHES, AND PARKS

Appellants made no argument in support of their contention that issuance of the license would cause interference with schools, churches, and parks, and we consider the contention waived.

II

Before testimony began at the hearing, the ALJ suggested that the 14 protestants who attended the hearing, only one of whom was represented by counsel, might want to have a single spokesperson. To that end, Sternberg, counsel for protestant Moniot, met with the unrepresented protestants, and most of them decided to retain Sternberg. Sternberg then requested a 30- to 60-day continuance to consult with his new clients regarding their concerns and how they wished to proceed. One of the protestants offered to pay for any additional costs incurred by the Department or the applicant as a result of any continuance that might be granted.

Both the Department and the applicant objected to a continuance because of their time and expense in preparing for and traveling to the hearing. The applicant also objected because the restaurant had been completed but not opened because the Department would not grant an interim permit until after the protest hearing.

The ALJ denied the request for continuance, and appellants contend on appeal that the denial was improper. They argue that they showed good cause for the continuance and neither the Department nor the applicant demonstrated they would suffer sufficient prejudice to warrant denial of the request.

Pursuant to Government Code section 11524, the ALJ has the right to grant or deny a request for a continuance for good cause. A party has no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens v. Dept. of Alcoholic Beverage Contro*l (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Appellants state that the ALJ should have permitted the continuance so that all the protestants could "avail themselves of legal representation and afford counsel an opportunity to gain relevant facts and testimony." However, all the protestants had sufficient time to avail themselves of legal representation before the beginning of the hearing. Their choice to do so at the last minute does not justify the inconvenience and expense to the tribunal and the other parties, who remained ready to proceed at the time scheduled.

Appellants argue that they showed good cause for a continuance at the hearing and that the applicant and the Department did not show that they would be significantly prejudiced by a continuance. Appellants, however, have not alleged, that they themselves were actually prejudiced by the denial of their request. They state that the ALJ's denial was "manifestly improper," but they have not shown that they were unfairly disadvantaged or that a continuance would have allowed them to obtain additional or different information that would have provided them with evidence materially aiding their case. Appellants' vague generalization that they needed more time "to confer . . . and gather facts" lacks the specificity that would assure that this request was for a legitimate, necessary purpose as distinguished from a simple delaying tactic or "fishing expedition."

We cannot say that the ALJ abused his discretion in refusing to continue the hearing.

III

Appellant contends that the findings of fact are not supported by the record, and presents a "comparison of testimony . . . to findings of purported fact." This comparison consists of the recitation of excerpts from the findings in one column and excerpts from

the reporter's transcript of the witnesses' testimony in a second column. The implications appellants see in these comparisons is not explained.

While there is clearly some testimony that is not reflected on the findings, the decision is not required to discuss every contention, and appellants have not directed us to, nor do we see any, misrepresentation of testimony. The findings represent the ALJ's distillation of the relevant evidence presented and adequately reflect the substantial evidence that supports them.

IV

Appellants contend the Department is somehow required to investigate an application for all matters affecting the public welfare, health, and safety, and that it erred in limiting the investigation to matters within its jurisdiction and authority. They argue that, because other state agencies with responsibilities for protecting health and welfare lack the authority to investigate tribal facilities because of the tribe's sovereign nation status, the Department must, essentially, fill in for these agencies.

Appellants cite no authority for their contention that the Department is responsible for investigating health and safety concerns that would be the responsibility of other agencies were it not for the tribe's sovereign nation status. The short answer to their contention is that the Department has only the authority granted it by the California Constitution and the Legislature, and its jurisdiction is limited to matters directly related to the Alcoholic Beverage Control laws. Anything outside that jurisdiction is governed by the provisions of the State-Tribal Agreement.

Appellants are simply wrong about this.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This 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.