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

**AB-8525**
File: 21-264805 Reg: 05058932

KYUNG JA CHUNG and SUNG HO CHUNG dba Carbaugh's Market
1021 North "A" Street, Lompoc, CA 93436,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 7, 2006
Los Angeles, CA

**ISSUED JANUARY 16, 2007**

Kyung Ja Chung and Sung Ho Chung, doing business as Carbaugh's Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application for an on-sale general license.

Appearances on appeal include appellants Kyung Ja Chung and Sung Ho Chung, appearing through their counsel, Martin P. Cohn, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants have operated a market in the City of Lompoc, and have held an off-sale beer and wine license for fourteen years, with no record of discipline. They now appeal the Department's denial of their application for the issuance of an off-sale general license. The new license would permit appellants to sell distilled spirits in addition to wine and beer.

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[1]The decision of the Department, dated January 31, 2006, is set forth in the appendix, together with the proposed decision of the administrative law judge.

Following an administrative hearing, Administrative Law Judge Ronald M. Gruen issued a proposed decision stating that appellants had met their burden of establishing their entitlement to the sought-for license. The Department, in a decision made pursuant to Government Code section 11517, subdivision (c), adopted certain of the findings set forth in the proposed decision, made one additional finding of its own, together with a number of determinations of issues and conclusions of law, and denied the application.

Appellants have filed a timely appeal from the Department 's order, and raise a number of issues: (1) granting of the application would not increase the number of licenses so as to result in or increase undue concentration; (2) the Department failed to consider the location of appellants' premises in the reporting area in relation to that part of the reporting area accounting for the crime statistics which result in the reporting area being a "high crime" area for purposes of undue concentration; (3) the application falls within the exception set forth in Business and Professions Code section 23958.4, subdivision (f); (4) the crime statistics utilized by the Department are overly broad and not current; (5) the number of retail licenses was not properly calculated; (6) the determination that convenience or necessity was not shown lacked current validity; and (7) the Department and the Lompoc Police Department (acting for the local governing body) did not properly analyze public convenience and necessity. Issues 6 and 7 are sufficiently related to be discussed together.

DISCUSSION

The language of two sections of the Business and Professions Code - sections 23958 and 23958.4 - controls any analysis of the issues in this case.

Section 23958 mandates the Department, upon receipt of an application for a license or a transfer of a license, to conduct a thorough investigation of all matters

which may affect public welfare and morals to determine whether the applicant and the premises qualify for a license. This section further mandates 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."

Section 23958.4 sets forth several formulae for determining undue concentration as that term is used in section 23958, and for determining whether exceptions exist to the mandate in section 23958. Section 23958.4 provides, in pertinent part:

> (*a) For purposes of Section 23958, "undue concentration" means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where any of the following conditions exist:*
>
> *(1) The applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, as defined in subdivision (c), than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency.*
>
> *(2) As to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located.*
>
> *(3) As to off-sale retail license applications, the ratio of off-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of off-sale retail licenses to population in the county in which the applicant premises are located.*
>
> *(b) Notwithstanding Section 23958, the department may issue a license as follows:*
>
> *(1) With respect to a nonretail license, a retail on-sale bona fide eating place license, a retail license issued for a hotel, motel, or other lodging establishment, as defined in subdivision (b) of Section 25503.16, a retail license issued in conjunction with a beer manufacturer's license, or a winegrower' s license, if the applicant shows that public convenience or necessity would be served by the issuance.*
>
> *(2) With respect to any other license, if the local governing body of the area in*

*which the applicant premises are located, or its designated subordinate officer or body, determines within 90 days of notification of a completed application that public convenience or necessity would be served by the issuance. The 90-day period shall commence upon receipt by the local governing body of (A) notification by the department of an application for licensure, or (B) a completed application according to local requirements, if any, whichever is later.*

*If the local governing body, or its designated subordinate officer or body, does not make a determination within the 90-day period, then the department may issue a license if the applicant shows the department that public convenience or necessity would be served by the issuance. In making its determination, the department shall not attribute any weight to the failure of the local governing body, or its designated subordinate officer or body, to make a determination regarding public convenience or necessity within the 90-day period.*

*(c) For purposes of this section, the following definitions shall apply:*

*(1) "Reporting districts" means geographical areas within the boundaries of a single governmental entity (city or the unincorporated area of a county) that are identified by the local law enforcement agency in the compilation and maintenance of statistical information on reported crimes and arrests.*

*(2) "Reported crimes" means the most recent yearly compilation by the local law enforcement agency of reported offenses of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and motor vehicle theft, combined with all arrests for other crimes, both felonies and misdemeanors, except traffic citations.*

*(3) "Population within the census tract or census division" means the population as determined by the most recent United States decennial or special census. The population determination shall not operate to prevent an applicant from establishing that an increase of resident population has occurred within the census tract or census division.*

*(4) "Population in the county" shall be determined by the annual population estimate for California counties published by the Population Research Unit of the Department of Finance.*

*...*

*(d) For purposes of this section, the number of retail licenses in the county shall be determined by the most recent yearly retail license count published by the department in its Procedure Manual.*

*...*

*(f) This section shall not apply if the premises have been licensed and operated with the same type license within 90 days of the application.*

The thrust of section 23958.4 is that undue concentration, loosely translated as meaning too many licenses, can exist as a result of a numerical surplus of licenses in a reporting area (subdivision (a)(3)), or the existence of a requisite number of crimes and arrests in a crime reporting area as compared to the average number of crimes in all crime reporting areas within the jurisdiction of the local law enforcement agency (subdivision (a)(1)). Where such undue concentration exists, and none of the exceptions in the statute apply, the Department has no discretion but to deny an application.

Section 23958.4 contains two exceptions which permit the Department to issue the license even where undue concentration, which would otherwise mandate denial, is present. The first exception, set forth in subdivision (b)(2), would apply if the local governing body of the area in which the applicant premises are located (the city of Lompoc), or its designated subordinate officer or body (the Lompoc Police Department), had determined within 90 days of notification of a completed application that public convenience or necessity would be served by the issuance of the license. In fact, the Lompoc Police Department declined to do so. By letter dated January 30, 2004 (Exhibit 4), it stated: "The Lompoc Police Department can not identify a public convenience or necessity to increase the license level of this business. There are presently more ABC licenses in the census tract (0027.6) than ABC has recommended." The letter went on to state that the Police Department opposed an increase in the level of licensing.

The second possible exception is contained in subdivision (f). As will be seen in

the discussion which follows, appellants claim this exception applies, and the Department disagrees.

I

Appellants first contend that conversion of their existing off-sale beer and wine license to an off-sale general license would not add to or increase the number of licenses, and, thus, not result in or increase undue concentration.

The Department argues that appellants waived this contention by not raising it at the administrative hearing, and, in any event, appellants are wrong that the number of licenses in the census tract would not increase. According to the Department, if the license appellants seek were to be granted, the existing license would have to be surrendered, transferred, or cancelled, since only one license may be active at a given premises at any one time. Only if cancelled would issuance of the new license not result in an increase in the number of licenses and add to undue concentration. Since appellants have never shown what they intend to do with the existing license, they have not disproved an increase in the number of licenses and in undue concentration.

The Department's argument is somewhat disingenuous. It is correct that appellants did not articulate what they intended to do with the existing license if their application was granted. However, the Department never specifically contended that the new license would add to the license count, in the unlikely event appellants intended to surrender their existing license and thereby keep it active, or attempt to transfer it.

At the administrative hearing, the Department viewed appellants' application as seeking to "upgrade" the existing license, which to us suggests an enlargement of the privileges of the license. True, this is done by the formal issuance of a new license, but

it does not follow that the existing wine and beer license must survive.

Our own review of the hearing transcript reveals that very little time and attention was devoted to the issue of undue concentration as a result of high license count, or the effect of the issuance of the license on that count. In light of the relatively heavy emphasis placed on license count in the decision of the Department, it does not seem reasonable to say that appellants waived the issue by not raising it at the hearing.

Of course, this does not end our analysis. Appellants have other problems.

II

Appellants contend that the Department should have given consideration to the fact that the premises is located in an area within the census tract which is remote from that portion of the area where most of the crimes and arrests are centered. Appellants rely on *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Kolender)* (1982) 136 Cal.App.3d 315 [186 Cal. Rptr. 189], a case involving Department Rule 61.3 (Title 4, Cal. Code Regs., §61.3). The language of Rule 61.3 is similar to that in section 23958.4, subdivision (a) (1), except that it requires both a 20 percent greater crime rate and a greater ratio of licenses to population for a finding of undue concentration. In that case the court held that the Department abused its discretion when it denied an application for a license because the crime statistics in the reporting area satisfied the formula of the rule, even though there was no evidence of a police problem or undue concentration in the immediate vicinity of the proposed premises.

Appellants argue that almost all of the crimes and arrests making up the statistical evidence that denotes the census tract a high crime area occur along a major thoroughfare on one border of the tract, while very few crimes and arrests are reported for the eight-block residential area where the premises are located. Applying the

reasoning contained in *Kolender*, appellants argue, the Department abused its discretion when it looked only at the census tract as a whole.

The Department, in response, asserts that *Kolender* is no longer persuasive, following the enactment of section 23958.4, which became effective January 1, 1995. Section 23958.4 mirrors Rule 61.3 in most respects, but with some significant differences, and these differences, the Department contends, undercut the holding in *Kolender*. The Department points to the amendments to sections 23958 in 1995 which changed the word "may" to the word "shall" preceding the words "deny an application for a license ... except as provided in Section 23958.4." Thus, the Department argues, whatever discretion it may have had under the original version of section 23958 to approve a license in circumstances of undue concentration, it no longer has that discretion.

Additionally, the Department argues, crime statistics are only half the problem. There is undue concentration due to the existence of "too many" licenses in the census tract - 10 existing off-sale licenses where 6 are permitted based upon the ratio of licenses to population.

We find the Department's arguments based on the crime statistics as a measure of undue concentration persuasive. The legislative changes to the statutes in question manifest the intent of the legislature that the Department not issue additional licenses in areas of undue concentration except as permitted in subdivisions (b) and (f) of section 23958.4, neither of which help appellants in this case.

We do not find the Department's arguments persuasive to the extent they are based on license count. The decision recites that "it is undisputed" that issuance of the applied-for license would add to an undue concentration of licenses. This assumes that

the applied-for license would not replace the existing license, a question left open at the hearing. Our assessment of the administrative record leaves us with the belief that, had that subject been addressed, appellants would have made clear their desire to substitute the one license for the other, as they have asserted on this appeal.

Nonetheless, the end result is that appellants need a determination of public convenience or necessity, and this they lacked. Without it, the Department argues, it was left without discretion but to deny the application.

We are not inclined to agree with the Department that it had no discretion but to deny the application. We do not read section 23958.4, subdivision (b)(2) so restrictively. Even without a determination of public convenience by the local governing body, the Department may, nonetheless, issue a license pursuant to the second paragraph of subdivision (b)(2) if the applicant "shows the department that public convenience or necessity would be served."

It is not apparent that appellants ever asked the Department to make such a determination. Appellants focused their attack on the lack of any explanation for the failure of the Lompoc police Department to make a public convenience determination. Only now do they contend the Department had an obligation to make its own determination. And the evidence they say compels the Department to do so, we think, is simply inadequate, as we explain in part VI, *infra.*,

III

Appellants claim entitlement to the exception set forth in subdivision (f) of section 23958.4. They argue that they held the same type of license during the 90 days preceding the application as the one sought, defining "type" to include all off-sale licenses or all on-sale licenses. Further, they argue that since undue concentration is

concerned with numbers of licenses, it is reasonable to treat all off-sale licenses as the same for the purpose of the exception.

The Department contends that "type" as used in the exception language refers to the type of licenses enumerated in Business and Professions Code section 23320. In that section, the variety of licenses the Department may issue are designated "Type 1, Type 2, etc." An off-sale beer and wine license is designated "Type 20," while an off-sale general license is a "Type 21."

Appellants cite no authority in support of their argument that all off-sale licenses are the same type. We think the Department's argument more persuasive, since its interpretation of the word "type" rests on specific statutory footing. Moreover, It is generally accepted that an off-sale general license has considerable value, especially as compared to an off-sale beer and wine license. It does not seem reasonable to treat licenses so different in character as being the same type within the meaning of that term as used in subdivision (f).

IV

Appellants challenge the crime statistics which the Department utilized in considering the application. They assert the statistics are overly broad and not current. The Department contends that appellants waived this issue by not only failing to raise it below, but also relying upon those same statistics in support of their theory of the case.

At the administrative hearing, during cross-examination of Jennifer Chastain, a records supervisor for the Lompoc Police Department, appellants' counsel questioned her about a summary of reported crimes and arrests (Exhibit D) prepared by appellants' counsel from records of the Lompoc Police Department. At no time did appellants question the accuracy of the underlying records or did they question the data's current

relevance. Additionally, In their references to the data as a whole and to the individual entries to which reference was made, no attempt was made by appellants to isolate entries which supposedly should not have been included in the statistical evaluation. Nor was there any contention that the statistical computations were inaccurate, or included incidents which should not have been included.

It is not the Board's function to analyze the evidence in response to arguments not made to an administrative law judge and make findings of fact based on such evidence. We agree with the Department that appellants waived this issue. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p. 444.)

V

Appellants contend that the Department erred in its calculation of the number of off-sale retail licenses permissible in the census tract by failing to note that the count should exclude the off-sale beer and wine license held by appellants, since that would be converted to an off-sale general license.

This contention is essentially the same as that discussed in part I, *supra*. Its resolution in appellants' favor does not require reversal, since, as our earlier discussion reflects, the decision can be sustained on other grounds.

VI

Appellants challenge the letter from the Lompoc Police Department finding an absence of public convenience or necessity as neither current not based on a thorough investigation, and claim that the Department and the Lompoc Police Department failed to conduct an appropriate examination of public convenience. They argue, without any reference to the record, that "circumstances and neighborhoods will and have changed tin a matter of such an expanse of time," and that the signed petitions (Exhibit E),

admitted only as administrative hearsay [RT 121] show the requisite public convenience.

The Department argued at the hearing that the determination by the Lompoc Police Department was binding on the Department, and appellants should not be permitted to attack that determination before the Department.

We are inclined to agree with the Department to the extent that appellants' attack on the validity of the police finding was misdirected. There was opportunity to challenge it at the city level, and appellants made no attempt to do so. They can no more challenge that determination here than they could at the Department level.

Nor do we agree that appellants' signed petitions defeat the city's determination or require the Department to ignore it. The signers of the petitions were asked only if they did not object to the sale of hard liquor by appellants. In the absence of any other evidence, this falls far short of any clear declaration that the sale of distilled spirits at appellants' store would be a public convenience.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.