

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

AB-9181

File: 41-478682 Reg: 11074264

JOHN MURRAY and JAMES SANBONMATSU, Appellants/Protestants

v.

PATCH EDWARDS LLC, dba Monk's Kettle
3141 16th Street, San Francisco, CA 94103,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 5, 2012
San Francisco, CA

ISSUED MAY 1, 2012

John Murray and James Sanbonmatsu (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Patch Edwards LLC, doing business as Monk's Kettle (respondent/applicant), for an on-sale beer and wine eating place license for the outdoor expansion area of their premises.

Appearances on appeal include appellants/protestants John Murray and James Sanbonmatsu, appearing in pro. per.; respondent/applicant Patch Edwards LLC,

¹The decision of the Department, dated August 1, 2011, is set forth in the appendix.

appearing through its counsel, Tom Kerr; and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Cline Hoganson.

FACTS AND PROCEDURAL HISTORY

In 2007, the Department issued an on-sale beer and wine public eating place license for the interior of the premises. The premises has no record of disciplinary action. In March or April of 2009, the City of San Francisco issued a permit which allowed the applicant to place 6 tables and 12 chairs on the sidewalk outside the premises. In May 2009, the applicant petitioned for issuance of a premises to premises on-sale beer and wine eating place license, to permit the consumption of alcoholic beverages in this sidewalk area. Protests were filed by appellants, and an administrative hearing was held on May 18, 2011. At that hearing, oral and documentary evidence was presented concerning the application and the protests by Joan Bernardino, an ABC licensing representative; the applicant, Nathaniel Cutler; and three protestants: James Sanbonmatsu, John Murray, and Julie Racicot, all of whom reside on Albion Street, adjacent to the premises.

Subsequent to the hearing, the Department issued its decision which denied appellants' protests and allowed the license to issue with 14 conditions, in addition to 2 conditions already in place on the existing license.

Appellants thereafter filed a timely appeal making the following contentions: (1) the Department failed to conduct a thorough investigation; and (2) the finding of public convenience and necessity was not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the Department investigator failed to conduct a thorough investigation, as required by Business and Professions Code section 23958, which states in pertinent part:

Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

Appellants maintain that the investigation which was conducted of the premises was not "thorough," as required by section 23958, because the licensing representative visited at 11:00 a.m. and not during business hours. Appellants maintain that the potential problems they complain of, such as noise and loitering, would not be evident unless the investigation took place later in the day.

The licensing representative that conducted the investigation prepared a 15-page report (Exh. 2), recommending that the license issue with a total of 16 conditions to address the concerns of the Department and the protestants. The first 2 conditions were previously imposed on the existing license, and conditions number 3 through 16 were added as a result of the sidewalk expansion:

1. The premises shall be maintained as a bona fide restaurant and shall provide a menu containing an assortment of foods normally offered in such restaurants.
2. During normal hours [*sic*] meal hours, at least between 11:00 a.m. and 9:00 p.m., the premises seating shall be designed and used for and must possess the necessary utensils, table service, and

condiment dispensers with which to serve meals to the public.

3. The monthly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period. The licensee shall at all times maintain records which reflect separately the gross sales of food and the gross sales of alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a monthly basis and shall be made available to the Department on demand.
4. The licensee shall comply with the provisions of Section 23038 of the Business and Professions Code and acknowledges by the signed, attached "Acknowledgment" dated 7-6-09, that incidental, sporadic, or infrequent sales of meals or a mere offering of meals without the actual sales shall not be deemed sufficient to consider the premises in compliance with the above code section.
5. Noise (noise is defined as "any raucous sound that is produced in such a manner or to such a degree as to disturb the peace, quiet, and comfort of persons in the neighborhood") shall not be audible beyond the area under the control of the licensee.
6. Graffiti shall be removed from the premises and all parking lots under the control of the licensee within 72 hours of application. If the graffiti occurs on a Friday or weekend day, or on a holiday, the licensee shall remove the graffiti within 72 hours following the beginning of the next weekday.
7. The exterior 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 premises. Additionally, the position of such lighting shall not disturb the normal privacy and use of any neighboring residences.
8. Loitering (loitering is defined as "to stand idly about; linger aimlessly without lawful business") is prohibited on any sidewalks or property adjacent to the licensed premises under the control of the licensee(s).
9. The petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control.
10. Applicants have been issued and will comply with the provisions of the Department of Public Works Tables and Chairs Permit issued pursuant to Article 5.2 of the Public Works Code.
11. Applicants will maintain the Department of Public Works Permit,

and keep a copy of same and any revisions thereto, on the premises at all times and will make said permit available for immediate inspection by any law enforcement personnel upon request.

12. Applicants will provide the Department with a copy of the Department of Public Works Tables and Chairs Permit and any approved revisions to the permit prior to the effective date of the revision.
13. Sales, service, and consumption of alcoholic beverages shall only be allowed on the sidewalk area of the premises to patrons seated at the tables and chairs authorized by the Department of Public Works Tables and Chairs Permit.
14. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises, except the licensed sidewalk seating area, under the control of the licensee.
15. The boundaries of the sidewalk seating area will be clearly defined and designated by physical barriers to separate it from the public sidewalk and adjacent private property which is not under the exclusive control of the licensee(s). These barriers and boundaries shall not be changed without prior approval from the Department of Alcoholic Beverage Control.
16. The licensee(s) or an employee of the licensee(s) will monitor the sidewalk seating area at all times that alcoholic beverages are being served or consumed, to ensure that the premises will operate in compliance with all applicable laws and/or conditions.

The Department has been granted exclusive jurisdiction to "license the manufacture, importation and sale of alcoholic beverages in the State" (Cal. Const., art. XX, § 22, par. 9.) The Department also has the power, "in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude." (*Ibid.*) The discretion legally vested in an administrative body, such as the Department, is broad and inclusive and is not subject to judicial control when exercised within its legal limits. (*Walsh v. Kirby* (1974) 13 Cal.3d 95, 103, [118 Cal.Rptr. 1, 529 P.2d 33]; *Martin v. Alcoholic Bev. etc. Appeals Bd.* (1959) 52 Cal.2d 287, 295, [341 P.2d 296].) However, deference to the Department's interpretation of the Act is not unlimited. It is subject to review and intervention by the Board and the courts in the event that the Department acts in an arbitrary and capricious manner, or in a manner which is not in

conformity with the spirit of the law. (*Walsh v. Kirby, supra*, 13 Cal.3d at p. 106.)

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Deleuze)* (2002) 100 Cal.App.4th 1066, 1072-1073 [123 Cal.Rptr.2d 278].)

"Where, as here, the trial court has discretionary power to decide an issue, its decision will be reversed only if there has been a prejudicial abuse of discretion. 'To be entitled to relief on appeal . . . it must clearly appear that the injury resulting from such wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . . [Citations.]' (6 Witkin, Cal. Procedure, Appeal, § 242, at p. 4234.)" (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932 [647 P.2d 1075].)

We do not believe that the investigation and recommended conditions were put forth in an arbitrary or capricious manner, or that the Department abused its discretion in issuing the license for the sidewalk expansion. It appears that the conditions imposed are a good faith effort to address the concerns of both the Department and protestants.

A thorough investigation is not necessarily a perfect investigation, and we are not prepared to say that the criticism registered by appellants demonstrates a failure on the part of the Department to perform its duties under section 23958.

II

Appellants contend secondly that the finding of public convenience and necessity is not supported by substantial evidence.

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the

findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "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].)

The Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779];) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The licensing representative's Report On Application for License (Exh. 2 at p. 4) states: "the applicant meets the requirements for Public Convenience or Necessity."

This conclusion is preceded by the following explanation:

Investigation of Public Convenience and Necessity:

Per the applicant's letter, it stated that since they opened the restaurant, their presence has cleaned up the corner of 16th and Albion streets. It is no longer occupied by drug dealers, trash, debris and graffiti diminished greatly. The letter also states that the outdoor seating area will not have a

negative impact to the nearby residents. Their customers are older and mature people. They will provide a comfortable and friendly outdoor seating area with heat lamped warmed seating. Monk's [K]ettle provides friendly service, quality wine and beer lists, their ingredients is [sic] made from organic and local sources.

Premise is a full service restaurant serving American cuisine. They offer a variety of beer and wine. The food is made from organic, local and sustainable ingredients. The atmosphere of the restaurant is friendly and comfortable. By having an outdoor seating area, there will be sufficient lighting so people will not loiter in the streets. The sidewalk where the outdoor tables are located will be monitored by the licensee and their employees. The applicant has signed operating conditions to that effect. The premises is located in San Francisco where we don't usually get a [sic] nice weather, so by having outdoor tables the nearby residents can enjoy an outdoor dining experience once in a while.

The ALJ makes a similar finding in Determination of Issues I:

[. . . The issuance of a new license to Applicant restaurant will result in Applicant's neighbors not having to go elsewhere to consume alcoholic beverages while eating their meals outdoor[s]. Accordingly, the issuance of a new license to Applicant would serve "public convenience or necessity" as required by Section 23958.4(b)(1).]

We disagree with appellants that insufficient evidence exists to support the ALJ's findings simply because appellants' arguments support a contrary conclusion.

However, we take note of the ALJ's Finding of Fact VI:

The Department's licensing representative has placed on Applicant's license conditions -- especially Condition # 5 -- to assure that the outdoor consumption of alcoholic beverages by Applicant's customers will not interfere with the Protestants' quiet enjoyment of their homes. Applicant is on notice that violation of the conditions on its license can result in suspension or revocation of the license.

We would hope the Department diligently monitors the situation to ensure that, in fact, noise - whether raucous or otherwise - does not become the problem feared by appellants.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.