

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

AB-9209

File: 47-465674 Reg: 11074678

SCOTT CHIPMAN, Appellant/Protestant

v.

B4 ENTERTAINMENT, LLC, dba Dirty Birds
4654-56 Mission Boulevard,
San Diego, CA 92109
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 31, 2012
Los Angeles, CA

ISSUED JUNE 15, 2012

Scott Chipman (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of B4 Entertainment, LLC, doing business as Dirty Birds (respondent/applicant), for an on-sale general public eating place license.

Appearances on appeal include appellant/protestant Scott Chipman, appearing in pro. per.; respondent/applicant B4 Entertainment, LLC, appearing through its counsel, William R. Winship, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated November 8, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On May 29, 2009, applicant, which already held an on-sale beer and wine public eating place license, petitioned for issuance of an on-sale general public eating place license. Protests were filed by appellant (and others), and an administrative hearing was held on May 12, 2011. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Applicant has held an on-sale beer and wine public eating place license and operated a restaurant at this address since May 2008 with no history of any disciplinary action. The premises is located on a major thoroughfare in a mixed commercial and residential area of Pacific Beach. There are eight residences within 100 feet of the premises. None of the residents living within 100 feet filed a protest against applicant's petition to upgrade its license to a type 47 on-sale general public eating place license.

The San Diego Police Department filed a conditional protest in this matter, but withdrew it when the applicant agreed to seven conditions to be placed on the license. Several individuals filed protests, including appellant Scott Chipman, but all of the individual protestants lived more than a mile from the premises. The protestants did not specifically object to the operation of the subject premises, but argued that the area in which it is located has a high crime rate and an over-concentration of on-sale licenses. Appellant requested conditions on the license requiring that gross sales of alcohol not exceed 30 percent of gross sales of food and that a restriction be placed on the hours during which alcoholic beverages could be sold.

Subsequent to the hearing, the Department issued its decision which denied the individual protests and allowed the license to issue with seven specified conditions. Appellant thereafter filed an appeal making the following contentions in its letter of

appeal: Respondent/applicant did not prove that patrons who drink in the premises will not commit crimes and disturb the surrounding area, and the Department should treat this license as it did another one in the area. Appellant did not file any additional brief in this matter.

DISCUSSION

I

Appellant contends that applicant failed to prove at the hearing that patrons who drink in the premises will not commit crimes and disturb the surrounding area.

In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084 & 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

The Department is vested with great discretion in determining whether or not a license should be issued, and the Appeals Board is not empowered to interfere with the Department's discretion unless it is exercised unreasonably.

In determining whether facts established by substantial evidence constitute good cause for concluding that issuance of a license will not be contrary to public welfare or morals, the 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 upon the

same subject Where the decision is the subject of 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. [Citations.] Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises. [Citations.]

(*Koss v. Dept. Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219].)

This issue was raised at the hearing and appellant's position was rejected in the Department's decision, which found as follows (Findings of Fact III-E):

As indicated, the Applicant has operated its restaurant at the premises since May of 2008 without any disciplinary action and none of the current residents who live within 100 feet of the premises filed a protest in this matter. While there will be no restriction on the sale, service, or consumption of alcoholic beverages beyond the statutory requirements, that alone does not mean that the issuance of the subject license will interfere with the nearby residents. Indeed, this location has been licensed since 1991, and since 2008 by the Applicant under a Type [41] without any such limitation on hours and, as indicated, without incident. The Applicant has been operating as a Type 47 under an Interim Operating Permit without incident since October 2010. It is pure speculation to conclude that the Applicant will convert the business to a nightclub or bar, or otherwise operate in a manner inconsistent with being a good neighbor, without any additional condition limiting the hours during which alcoholic beverages may be sold, served, or consumed. The seven proposed conditions are sufficient to insure that the premises will be operated in a manner that will not interfere with the quiet enjoyment of nearby residents. Thus the Applicant has met its burden and the protestants have failed to present sufficient evidence that the issuance of this license would be improper.

Appellant complains that the applicant did not prove that crime would not increase in the area, only that there have been no calls for service or complaints in the almost three years since the restaurant was originally licensed or the seven months since it has operated as a general on-sale public eating place under an interim operating permit. The applicant, however, is not required to prove a negative.

The Department reasonably inferred from the evidence presented about the applicant's years without incident that operation of the premises would not interfere with the nearby residents' quiet enjoyment of their property. (See *Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 441 ["Of necessity, in appraising the likelihood of future harm to the public welfare, the Department must be guided to a large extent by past experience . . ."].) Therefore, substantial evidence exists supporting the Department's findings and determination.

II

Appellant contends the Department should have imposed the same conditions on this license as it did on another license issued in Pacific Beach.

At the hearing, appellant presented the Petition for Conditional License of Great Plaza Buffet, Inc., imposing a number of conditions more restrictive than those proposed for the applicant's license. This document was admitted into evidence for a limited purpose: "just to see that the Department has for some reason at other times imposed different conditions on a different premises." [RT 115-116.]

Each licensing situation must be considered on its own; just because certain conditions were imposed on one license does not mean that the Department must impose the same conditions on another license, even if the licenses are in the same area. Appellant was not able to provide any evidence regarding the circumstances or operation of Great Plaza Buffet so there is no way to know if that operation is at all similar to applicant's operation.

On both general principles and specific facts, appellant's attempt to use Great Plaza Buffet as some sort of standard for conditions to be placed on applicant's proposed license must fail.

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.