

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

AB-9284

File: 41-464584 Reg: 12076483

HERMOSA PIER 20 LLC, dba Silvio's Brazilian BBQ & Grill
20 Pier Avenue, Hermosa Beach, CA 90254-3732,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 29, 2013

We have concluded that we must reverse, in part, a Department decision which involves a practice the Department appears to have pursued in person-to-person license transfer cases since the enactment of Business and Professions Code section 23800, subdivision (e) in 2001. The Board's decision could result in large numbers of petitions being filed seeking to remove license conditions imposed by the Department through the use of section 23800 in such cases.

Hermosa Pier 20 LLC, doing business as Silvio's Brazilian BBQ & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹

¹The decision of the Department, adopted June 28, 2012, is set forth in the appendix.

which denied its petition to remove certain conditions from its license.

Appearances on appeal include appellant Hermosa Pier 20 LLC, appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

On July 30, 2008, petitioner's managing member, Doug Horwarth, executed a Petition for Conditional License (PCL) (Exhibit 2) in connection with a pending application for a person-to-person transfer of an on-sale beer and wine public eating place license in Hermosa Beach, California. The PCL contained the following recitals, among others:

WHEREAS, the Hermosa Beach Police Department has provided the Department with substantial evidence of an identifiable problem which exists at the premises or in its immediate vicinity; and,

WHEREAS, transfer of the existing unrestricted license would be contrary to public welfare and morals; and,

WHEREAS, pursuant to Business and Professions Code Section 23800(e) the Department may grant a license transfer where the transfer with conditions will mitigate problems identified by the local governing body or its designee; and

WHEREAS, petitioners stipulate that, by reason of the existence of substantial evidence of identifiable problems at the premises or in its immediate vicinity, grounds exist for denial of said transfer.

The document concludes with a paragraph which recites:

NOW THEREFORE, the undersigned petitioner(s) do/does petition for a conditional license as follows, to wit:

1. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 6:00 a.m. to 12:00 **Midnight** daily.
2. The quarterly gross sales of food shall exceed the gross sales of alcoholic beverages during the same period. The licensee shall at all times maintain records which reflect

separately the gross sale[s] of food and the gross sales of alcoholic beverages of the licensed business. Said records shall be kept no less frequently than on a quarterly basis and shall be made available to the Department on demand.

These two conditions are the subject of appellant's appeal.²

PROCEDURAL HISTORY

In January, 2008, Chief Gregory Savelli of the Hermosa Beach Police Department filed objections against an application for a person-to-person license transfer sought by Il Boccaccio, Inc., (hereafter "Il Boccaccio") involving an on-sale beer and wine licensed premises located at 29 Pier Avenue in Hermosa Beach, operated by Carla and Joseph Venezia. In response to the Chief's objections, the Department, pursuant to Business and Professions Code section 23800, subdivision (e)³, sought to impose two new conditions on the license: (1) sales, service and consumption of alcoholic beverages shall be permitted between the hours 6:00 a.m. to 12:00 midnight each day of the week; and (2) the quarterly gross sales of alcoholic beverages shall not exceed the sales of food during the same period. The new conditions were imposed for the purpose of mitigating law enforcement problems described by the Chief as existing

²There are eight additional license conditions which are not involved in this appeal.

³Section 23800(e), in 2006, stated, in pertinent part: "At the time of transfer of a license pursuant to Section 24071.1, 24071.2, or 24072 and upon written notice to the licensee, the department may adopt conditions that the Department determines are reasonable pursuant to its investigation, or that are requested by the local governing body, or its designated subordinate officer or agency in whose jurisdiction the licensee is located. The request for conditions shall be supported by substantial evidence that the problems on the premises or in the immediate vicinity identified by its designated subordinate officer or agency, will be mitigated by the conditions.

Unless otherwise stated, all statutory citations which follow are to the Business and Professions Code.

at the premises or in the immediate vicinity. *Il Boccaccio* objected to the proposed conditions, refused to sign a Petition for Conditional License containing the two conditions, and petitioned the Department for their removal. The matter was heard on January 27, 2010.⁴ *Il Boccaccio* was represented by Richard D. Warren, who represents Hermosa Pier 20 LLC, doing business as Silvio's Brazilian BBQ & Grill (hereafter "Silvio's"), in the matter presently before the Board.

In its *Il Boccaccio* decision, the Department concluded that section 23800(e) did not empower it to impose conditions on a person-to-person transfer of a license, such transfers being governed by section 24071.1, which did not authorize the imposition of conditions.⁵

Also in 2006, Chief Savelli objected to a proposed person-to-person transfer of an on-sale eating place license to Hermosa Pier 20 LLC, doing business as Silvio's Brazilian BBQ & Grill, for premises located at 20 Pier Avenue in Hermosa Beach, unless the license contained the same two conditions as in dispute in the *Il Boccaccio* matter. No formal objection was made to a conditioned license, and, on July 30, 2008, Doug Horwarth, general manager of Hermosa Pier 20 LLC, executed a petition for conditional license containing the two conditions.

In 2008, following the decision in the *Boccaccio* matter, Silvio's petitioned for the removal of the offending conditions. The matter was heard on April 26, 2012, and in a

⁴The background information in this part of our decision is derived from a decision of the Department in the *Il Boccaccio* matter, issued April 8, 2010. (Registration No. 09071531; File No. 47-463116), of which we take official notice.

⁵Section 23800 was amended by the Legislature in 2008 to permit the imposition of reasonable conditions on a licensee in transfers made pursuant to section 23070 and 23070.1.

decision adopted by the Department on June 28, 2012, the Department reaffirmed its holding in the *// Boccaccio* decision which held that the Department lacked the statutory power to impose conditions in a person-to-person transfer made pursuant to section 24070 (Conclusion of Law 6):

... Did section 23800(e) authorize the imposition of conditions in cases involving a person-to-person transfer?⁸ A plain reading of the section indicates that it did not. Section 23800(e) expressly states that it applies to transfers under section 24071.1 (transfers of 50% or more of corporate stock) and 24071.2 (transfers of 50% or more of the membership interest of limited liability companies.) [fn. omitted.]

Significantly, section 23800(e) does not refer to section 24070 (person-to-person and premises-to-premises transfers). This omission clearly indicates that section 23800(e) does not apply to such transfers. The fact that section 23800(e) refers to section 24072 (which sets forth various transaction fees) does not change this conclusion—it strains credulity to argue that, rather than include section 24070 directly, the legislature did so indirectly by referring to section 24072.

In short, the Department did not have authority to impose the Exhibit 2 conditions under section 23800(e).

Nonetheless, Silvio's petition to remove the conditions was denied on the ground Silvio's had voluntarily signed a stipulation for a conditional license as part of an operational strategy which amounted to a waiver of any right to contest the conditions (Conclusion of Law 10):

Rather than fight the issue through the hearing process, the Petitioner settled the matter by agreeing to the Exhibit 2 conditions. In return for obtaining the license expeditiously, the Petitioner (a) agreed that a problem existed and (b) agreed to have conditions imposed on its license to address those problems. It cannot now change its mind and attempt to litigate those issues.

DISCUSSION

Silvio's argument, simply stated here, but well-expressed in its briefs, is that (a) the Department lacked the power to impose conditions in connection with a person-to-

person transfer, and (b) established law requires that the conditions it extracted through use of that purported power must be stricken. Appellant cites several decisions of the California Supreme Court which speak in terms of an obligation on the part of courts to declare void such attempts by administrative agencies to enlarge their statutory powers.

In *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-1036 [56 Cal.Rptr. 2d 109], the Court held that the Unemployment Insurance Appeals Board lacked the statutory authority to award prejudgment interest on benefit awards. In so doing, the Court cited its earlier decision in *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379 [241 Cal.Rptr. 67], that "specifically affirmed the rule that administrative regulations purporting to enlarge the scope of administrative powers are void, and that courts are obligated to strike them down." (See also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689]: ["Administrative regulations that alter or amend the statute or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"].

The Department argues that it could have imposed the conditions had it proceeded under section 23800(a),⁶ and that its decision in *Il Boccaccio* is not a controlling precedent. The Department is wrong on both counts. It did not proceed under section 23800(a); throughout its dealings with appellant, it relied on section 23800(e) for its authority; and it is not at all clear that, in the context of person-to-person

⁶Section 23800(a) provides that the Department may place reasonable conditions on retail licenses where grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and the department finds that those grounds may be removed by the imposition of those conditions. By its terms, it does not apply to a person-to-person license transfer.

transfer, section 23800(a) could even apply, as the Department's own decision in *Il Boccaccio* indicates; and whether or not *Il Boccaccio* is a binding precedent, the Department has offered nothing to overcome its reasoning expressed in that decision.

It is difficult to see how this Board is expected to ignore the facts found in *Il Boccaccio* as relevant and important in the present appeal. After all, *Il Boccaccio* and *Silvio's* were both chosen by Chief Savelli as transferees whose serving hours were to be shortened. There were other businesses on the pier which might have been selected, and if late night closing problems were paramount in his thinking, why were the two licensees, among those with the fewest police problem incidents attributed to them of all those on the Hermosa Pier, chosen from all available candidates for earlier closings? (See tables accompanying Exhibit 5.)⁷ The Department neither sought nor was it given reasons why Chief Savelli selected the two he did.

We are not persuaded by the Department's argument that appellant should be denied relief because it "voluntarily" accepted the conditions in order to gain an expeditious processing of the desired transfer. Appellant was confronted with an expense and delay that could well have cost it its existence. The choice it made was in all probability the only choice it could have made to survive. Mr. Howarth's testimony was not challenged when he explained why he accepted the stipulation [RT 131-132]:

⁷The Department found as a fact in *Il Boccaccio* (Finding of Fact 18) that

[w]hile the transfer of *Il Boccaccio* was pending, other locations in the Pier Plaza area submitted person-to-person applications for transfers. One location, "Sylvia's", [sic] did not contest the imposition of added conditions. No request for additional conditions from the city was made during the transfer process of "Boogaloo" or "Underground." They are allowed to remain open under their Conditional Use Permit until 1:30 or 2:00 am. Person-to-person transfers of licenses at "The Poop Deck" and "The Mermaid" did not trigger a request for additional conditions.

Well, you know, when I first got [the] protest, obviously there was -- I told all the investors, the partners, and there was a big uproar, and we had to figure out what we were going to do.

A. And I talked to Ron and Greg. In my work experience with them in knowing their reputation, regardless of what people say, they're very good business men; and their position was -- and they had the wallet to fight it aggressively, because they firmly believed that there was no right for this person-to-person transfer to be intervened in.

Q. To have conditions imposed?

A. To have conditions imposed.

Q. So what -- how did that enter into your decision-making?

A. Well, we did not have deep pockets, as they did. I was put in a position with discussions after this happened with the chief, with ABC being told that there was no way I was going to get -- I was just [not] going to have the license transferred. It wasn't going to happen.

I would have to go -- if I disagree -- if I did not sign off and I went through the process, the process would take a year or two years by the time all the (inaudible) would go; that I would not be afforded any type the temporary license whatsoever in the meantime.

I would have -- and what that means to me, obviously, is tremendous loss of revenue, compared to the rent per square foot we're paying down on the Promenade; and then a humongous legal bill that was not incorporated in our business plan.

So we made a decision to -- we made the decision that if we did fight it, we would lose the business. And if we didn't fight it, you know, I believe with Ron and Greg, wanted to follow them and see what happen with their case, and let them spend the money, because they had lots of money.

And hopefully, you know, at some point in time, we could revisit the situation and fight it from the position where we should never have been, what I always considered, "strong-armed" into the position of having to sign off on something or not.

As the California Supreme Court has said, attempts by administrative agencies to expand their powers beyond those given by the Legislature are "void" and "courts are obligated to strike them down." (*Morris, supra*, 67 Cal.2d at 748.) Silvio's is entitled to

have the Department's actions stricken as inconsistent with section 23800(e).

The Department did not act according to law in this case, and its refusal to remove the conditions unlawfully imposed on Silvio's license is an abuse of the Department's discretion, one that compels reversal.

ORDER

The decision of the Department is affirmed with respect to its holding that the Department lacked the power to impose conditions pursuant to section 23800, subdivision (e), in connection with a person-to-person license transfer, reversed with respect to its denial of appellant's petition to remove conditions 1 and 2 from appellant's license, and remanded to the Department for such further proceedings as may be appropriate in light of our comments herein.⁸

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁸This 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.