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

**AB-9374**
File: 41-512047 Reg: 13078437

DUCKHAUS, INC.,
dba The Crooked Duck
5096 East Pacific Coast Highway, Long Beach, CA 90804,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 5, 2014
Los Angeles, CA

**ISSUED JUNE 26, 2014**

Duckhaus, Inc., doing business as The Crooked Duck (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied its petition for modification of a license condition to permit sales of alcoholic beverages between the hours of 8:00 a.m. and 11:00 p.m. seven days a week.

Appearances on appeal include appellant Duckhaus, Inc., appearing through its counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly Belvedere.

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[1]The decision of the Department, dated September 6, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was originally issued in 2004. At that time, the license contained eight conditions, the first of which limited sales, service and consumption of alcoholic beverages to the hours of 11:00 a.m. to 10:00 p.m. each day of the week. On August 19, 2011, following self-incorporation, appellant signed a Petition for Conditional License which carried over all eight conditions, including the sales restriction. On July 10, 2012, appellant petitioned for modification of the condition to permit sales of alcoholic beverages between 8:00 a.m. and 11:00 p.m. The Department denied the petition, and appellant requested a hearing.

An administrative hearing was held on July 16, 2013, at which time documentary evidence was received and testimony concerning the proposed modification was presented by Sharonda Harden, a former Department Licensing Representative; by James Hinkley, a Long Beach resident whose home is adjacent to the Licensed Premises; and by appellant's president, Joseph R. Rooney.

The evidence and testimony established that the condition was originally imposed for three reasons: (1) because the premises were located in a census tract with an undue concentration of licenses, (2) because the premises operated within 100 feet of residences, and (3) because issuance of a license without the condition would interfere with residents' quiet enjoyment of their property.

In support of the petition to modify conditions, Rooney testified that the premises is a family restaurant, not a bar. There is an outdoor patio, but it is enclosed in plastic sheeting to reduce noise. Rooney claimed that appellant is losing business because it cannot serve alcoholic beverages before 11:00 a.m. or after 10:00 p.m., and would like

to serve mimosas with breakfast and permit patrons to have a glass of wine with dessert without requiring them to pour it out at 10:00 p.m.[2]

Harden testified that she investigated appellant's petition for modification of conditions. She visited the premises and verified that there were still eight residences within 100 feet, and that one residence was located a few feet from the premises and was separated only by some shrubbery. She testified that the patio is about 26 by 8 feet, with seating for 20 patrons, and is enclosed in clear plastic sheeting. Harden also testified that the local census tract is no longer overconcentrated.

The Department sent letters to the eight residences located within 100 feet of the premises notifying them of appellant's petition for modification of conditions. The Department received a letter from Hinkley, who opposed the modification. Hinkley testified that his residence is located 69 inches from the premises' patio, that he can hear patrons on the patio from his bedroom before 11:00 a.m. He testified that he has had issues with noise from the premises, but has not filed a complaint because he was willing to go along with the existing license conditions. He objected to the modification, however, because of these noise concerns. Hinkley also expressed concern about limited parking space inducing patrons to park on the street, increased traffic, and safety issues for neighborhood children.

After the hearing, the Department issued its decision denying the petition, stating

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[2]At the administrative hearing, Rooney stated that appellant sought to extend the sales of alcoholic beverages to 11:00 p.m. only on Saturdays and Sundays. [RT 47-48.] However, both appellant's brief and Rooney's letter initiating the petition to modify the condition seek an extension to 11:00 p.m. every day of the week. (See App.Br. at pp. 2, 5; Letter from Joseph R. Rooney, July 10, 2012, Exhibit 1.) For purposes of this decision, we will assume that appellant wishes to sell alcohol between 8:00 a.m. and 11:00 p.m., seven days a week.

that petitioners failed to establish that the grounds which caused imposition of the condition no longer exist.

Appellant filed a timely appeal raising the following issues: (1) the Department erred in denying the petition for modification where some of the grounds for the condition no longer exist, and (2) the condition is unreasonable.

DISCUSSION

I

Appellant contends that the Department erred in denying its petition for modification of conditions. Appellant argues that of the three grounds for which the condition was imposed, only one remains, and that the Department failed to consider that the other grounds no longer exist. Moreover, appellant argues that the ALJ failed to consider appellant's operational history and intended use of its license.

The Department's authority for the imposition of condition is contained in Business and Professions Code section 23800, subdivision (a), which provides, in relevant part:

> The Department may place reasonable conditions upon retail licensees or upon any license in the exercise of retail privileges in the following situations:
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> (a) If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions.

Section 23803 permits the removal or modification of license conditions under certain limited circumstances:

> The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of a license, *if it is satisfied the grounds which caused the imposition of the conditions no longer exist*, shall order their removal or modification,

provided written notice is given.

(Bus. & Prof. Code § 23803, emphasis added.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. (See Cal. Const., art. XX, § 22; Bus. & Prof. Code §§ 23084 and 23085; and *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In reviewing the Department's decision, the 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 Appeals 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. (Bus. & Prof. Code § 23084.)

Appellant's Petition for Conditional License, signed by its representatives on August 19, 2011, recited the following reasons for the imposition of license conditions:

> WHEREAS, the proposed premises are located in Census Tract 5750.02 where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business and Professions Code; and,
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> WHEREAS, the proposed premises and/or parking lot, operated in conjunction therewith, are located within 100 feet of residences(s) [sic]; and,
>
> WHEREAS, issuance of the applied-for license without the below-described conditions would interfere with the quiet enjoyment of property by nearby residents and constitute grounds for denial of the application under the provisions of rule 61.4, of Chapter 1, Title 4, of the California Code of Regulations; and,
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> WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals. . . .

(Petition for Conditional License, Exhibit 2.)

It is undisputed that one of the original grounds for imposing the condition no longer exists — specifically, there is no longer an undue concentration of licenses in the census tract in which the premises are located. However, it is also undisputed that one of the grounds *does* remain — that is, there are still residences located within 100 feet of the premises, and as close as four feet from the premises' patio.

Based on the undisputed fact that at least one of the three grounds remains, the ALJ reached the following conclusion of law:

> In the instant case, the Petitioner has failed to meet its burden in establishing that all the grounds that caused the imposition of the condition no longer exist. Although the Census Tract where the premises are no longer [sic] over concentrated, eight residences are still located within 100 feet of the premises and the closest residence is located only four feet from the premises outdoor patio.

(Determination of Issues I.) Because there was no dispute that at least one of the three grounds for imposing the condition remained, appellant had failed to carry its burden of proof.

It is this interpretation of the law, however, which appellant challenges:

> [T]he Department fails to properly consider that not ***all*** grounds which originally required the imposition of conditions on Appellant's license are still present and thus, the Department fails to properly consider that the grounds for modification of the sale, service and consumption of alcoholic beverage hours at the licensed location may be modified on the basis of the lack of over-concentration in the area, Appellant's operation history, and Appellant's intended use of the sale, serve, and consumption of alcoholic beverages in a complimentary fashion to its family restaurant environment.

(App.Br. at pp. 4-5, emphasis in original.)

Appellant's misinterpretation of the law is twofold. First, the plain language of the statute requires that "the grounds which caused the imposition of the conditions no

longer exist." (Bus. & Prof. Code § 23803.) The phrase "the grounds" is unqualified — the statute does not allow for the removal of conditions where "any" or "one of the grounds" no longer applies. Appellant cites no authority in support of such a facially unjustified construction. Moreover, a plain-language application of section 23083 reflects wise policy. If, as here, a condition is imposed to address multiple concerns, but the condition may be removed if any *one* of those grounds disappears, then the remaining concerns, however serious, are left entirely unaddressed. Such a misapplication of the statute would hamstring the Department's ability to use license conditions as a compromise between its responsibility to preserve public welfare and the desires of the would-be licensee. The only valid, rational interpretation of section 23083 is that the grounds cited — *all* of them — must, to the satisfaction of the Department (Bus. & Prof. Code § 23803), no longer exist before a condition may be removed.

Second, there is nothing in section 23083, or in case law interpreting it, that requires the Department to consider factors falling outside the conditional license, such as operational history or intended business practices. On this point, appellant relies on a single case from this Board. See *Huh* (1999) AB-7155, which is unhelpful to him because it explains that "the operational history of the licensee and the current attitude of the community are sufficient to constitute changed circumstances . . . [and] may be considered, but . . . they [do not] control the Department's discretion." (*Id.* at p. 10.) In *Huh*, the appellant had relied on an earlier case, *Gebre-Mariam* (1992) AB-6177. This Board responded by distinguishing *Gebre-Mariam* and clarifying the rule:

> The *Moges Gebre-Mariam* case is one with its own peculiar facts, and offers little in the way of precedential value for this case. Appellant cites the case for the proposition that even without geographic or

> residential changes, the operational history of the licensee and the current attitude of the community are sufficient to constitute changed circumstances. We agree with appellant to the extent those factors *may* be considered, *but not to the extent they control the Department's discretion*.

(*Id.* at pp. 9-10, emphasis added.) The Board's ruling in *Huh* simply left the option open to the Department to consider factors such as operational history and community attitude in it discretion. It did not *require* that these factors be considered, and it certainly does not supply appellant with a means to circumvent the plain language of section 23083.

Moreover, even we if were to consider the outside factors appellant advocates, such as operational history or intended business practices, there is no guarantee that these factors will remain unchanged in the future. Once the condition is modified, the Department cannot reverse course, even if the change in hours *does* lead to drastically increased noise and complaints from nearby residents. Indeed, appellant could shift its business model away from a family restaurant entirely and toward something more rambunctious — a nightclub or sports bar, perhaps — and the Department would have no authority to reimpose the original conditions.

In the present case, the ALJ considered the original grounds for the conditions, determined that at least one of these grounds undeniably remained, applied the proper interpretation of the statute, and accordingly denied the petition for modification. We find no error.

II

Appellant contends that the condition itself is unreasonable. In particular, appellant argues that the premises already operate from 8 a.m. to 11 p.m., and that the Department has failed to show that the sale of alcohol during these hours will interfere

with any resident's quiet enjoyment.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke v. Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) Since appellant did not raise this issue at the administrative hearing, this Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 400, p. 458.)

It is worth noting, however, that appellant's argument on this point is not persuasive. Appellant's representatives signed a petition for conditional license that included both the condition in question and an explicit description of the grounds for imposing it, as referenced above. (See Petition for Conditional License, Exhibit 2.) This, in turn, was simply a reiteration of appellant's previous conditional license, signed in 2004, imposing the same condition for the same grounds. Appellant conceded the condition was reasonable when its representatives signed these documents. It is an unconscionable waste of this Board's time for appellant to introduce the argument — on appeal, nonetheless — that the condition is now unreasonable.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.