

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

AB-9428

File: 21-529997; Reg: 13079536

ADEL MAKAR,
Appellant/Protestant

v.

HI LITE LIQUORS, INC.,
dba Hi Lite Liquor
14111 Beach Boulevard, Westminster, CA 92683-4440,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 15, 2015

Adel Makar (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Hi Lite Liquors, Inc., doing business as Hi Lite Liquor (respondent/applicant), for an off-sale general license.

Appearances include appellant/protestant Adel Makar, through his counsel, Stephen J. Chonoles; respondent/applicant Hi Lite Liquors, Inc., through its counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated March 21, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

The proposed premises is a liquor store which has been continuously licensed with a type 21 license since March 1992. The previous holder of the licence closed the business on December 23, 2012, and surrendered the license on February 11, 2013. The following day, on February 12, 2013, the applicant petitioned for issuance of an off-sale general license. A protest was filed by appellant, and an administrative hearing was held on January 30, 2014. At that hearing, oral and documentary evidence was presented concerning the application and the protest by Kim Hong, a licensing representative with the Department of Alcoholic Beverage Control; by Zaher Hawara, president of the applicant corporation, Hi Lite Liquors, Inc.; and by protestant Adel Makar, the holder of five ABC licenses — one of which is a mile from the proposed premises, and four of which are within four miles of the proposed premises. (RT at pp. 7-8 and 32-33.)

Testimony established that since the premises were previously operated, within 90 days of the application, under the same type of license, neither rule 61.4 — regarding residences within 100 feet — nor section 23958.4 — regarding high crime and over concentration of licenses — apply. (Cal. Code Regs., tit. 4, § 61.4; Bus. & Prof. Code § 23958.4.) There are no schools, churches, public playgrounds, youth facilities, or hospitals within a 600 foot radius of the proposed premises. (RT at p. 26.) The Westminster Police Department has no concerns regarding traffic or law enforcement issues at the proposed premises. (RT at pp. 37 and 40.) Conditions were imposed on the license because of the Department's concern for the quiet enjoyment of nearby residents (RT at pp. 43-44; Exhibit 6), however none of the nearby residents, nor the City of Westminster, protested the issuance of the license.

Following the hearing, the Department issued its decision which denied appellant's protest and allowed the license to issue.

Appellant thereafter filed an appeal making the following contentions: (1) the Department's decision and findings are not supported by substantial evidence, and (2) the Department used an incorrect standard in approving the license.

DISCUSSION

Appellant maintains that the decision is not supported by substantial evidence. In particular, appellant argues that issuance of the license would be contrary to public welfare and asserts that "the Department did not apply the correct standard; the Department never made a determination as to whether the issuance of the requested license would be detrimental to the welfare of the public as a whole." (App.Br. at p. 3.) This issue was not raised at the administrative hearing.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d

181, 185 [67 Cal.Rptr. 734].) "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 [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].)

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 & 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].)

The ALJ considered the following issues at the administrative hearing:

The issues to be determined are whether issuance of the applied-for license would be contrary to public welfare or morals on the basis that:

- (1) it would lead to an over-concentration of licenses in the census tract;
- (2) it would lead to an over-concentration of alcohol outlets in the area;^[fn.]
- (3) it would create or aggravate a law enforcement problem in the area;
- and (4) it would create or aggravate a traffic problem in the area.

(Proposed Decision at pp. 1-2.)

The ALJ then reached the following conclusions on these points:

2. Section 23958 requires that the Department conduct a thorough investigation to determine, among other things, if the applicant and the Proposed Premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application which may affect public welfare or morals. It provides, in part, that the Department shall deny an application for a license if the applicant or the Proposed Premises do not qualify for a

license under the Act. It further provides that the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4.

¶

4. Section 23958.4 sets forth a two-prong test for determining whether an area has an over-concentration of licenses. The first prong relates to the number of reported crimes in the relevant reporting district, while the second relates to the number of licenses within the relevant census tract. An area is over-concentrated if either prong is met. Even if an area is over-concentrated, the license may still issue if the applicant demonstrates that public convenience or necessity would be served. Importantly, section 23958.4(f) provides that "this section shall not apply if the premises have been licensed and operated with the same type license within 90 days of the application."

5. The Proposed Premises has been continuously licensed with a type 21 license since 1992. The most recent licensee closed the business of December 23, 2012 and its license was surrendered on February 11, 2013. The application at issue here was filed on February 12, 2013, well within the 90-day limit set forth in section 23958.4(f). (Finding of Fact ¶ 2.) Accordingly, section 23958.4 does not apply.

6. Alternately, and without regard to census tracts, an excess number of licenses in a given area is also grounds for denying an application. Unlike the statutory definition of over-concentration, there is no set formula for determining what constitutes an excess number of licenses; rather, the overall impact of the license, should it issue, must be examined. The two over-concentration issues overlap to some degree and, although legally separate, are factually intertwined.

7. In the present case, there are just two active licenses within the same census tract as the Proposed Premises, only one of which is located within 1,000 feet of the Proposed Premises. The third license in the census tract is the former license for the Proposed Premises, which has been surrendered. Since only one license can be active at a single location, the surrendered license cannot be placed back into use if the applied-for license is issued. Phrased another way, even though the surrendered license "belongs" in this census tract, it is unusable—it can only be placed back into use upon the filing of an application to transfer it to another location. It is impossible to know if such an application will be filed or, if it is, if it will be to another location in the same census tract or somewhere else. In effect, the issuance of the applied-for license will not increase the number of alcohol outlets operating in the area. (Findings of Fact ¶¶ 2 & 4-5.) Accordingly, issuance of the applied-for license will not

lead to an over-concentration of licenses in the area.

8. There is no evidence of any law-enforcement problem in this area. Westminster P.D. did not submit a protest or otherwise object to a license being issued. There is no evidence that issuance of the applied-for license would create a law-enforcement problem. Of particular note, the Proposed Premises has been selling alcohol under an off-sale general license for over 20 years without any problems. Issuance of the applied-for license simply maintains the status quo. (Findings of Fact ¶¶ 2 & 6-7.)

9. There is no evidence of a traffic problem in the area, nor is there any evidence that issuance of the applied-for license would create such a problem. (Finding of Fact ¶ 9.)

(Conclusions of Law ¶¶ 2-9.)

In spite of this detailed explanation by the ALJ of why the license should issue, appellant asserts in his brief: "The burden was on the Applicant to prove that issuance of the applied-for license would not be detrimental to the public health, safety, or welfare. The Applicant failed to meet its burden of proof." (App.Br. at p. 8.)

In a protest matter, "the applicant bears the burden of proof regarding the applicant's eligibility for a liquor license from the start of the application process until the Department makes a final determination." (*Coffin v. Alcoholic Bev. Control Appeals Bd.* (2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420].) At the administrative hearing, the ALJ found that the applicant had met that burden of proof, and overruled the protest. On appeal, however, the protestant attempts to raise new issues: consideration points, zoning, and traffic (App.Br. at pp. 2-8) as well as asserting that the Department used an incorrect standard (App.Br. at pp. 1-2, 8). These issues were neither raised nor argued at the administrative hearing, and we are barred from considering them now.

Disagreement with the conclusions reached by the ALJ constitutes neither error nor abuse of discretion. The ALJ found that the applicant made its case — that the license should be issued — and, having failed to rebut that case at the administrative

hearing, appellant would like us to reweigh the evidence, to consider assertions which were not made or argued at the administrative hearing, and to reach a different conclusion. This we cannot do.

We have carefully reviewed the entire record in this matter and find that the decision is supported by substantial evidence.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.