

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

AB-9582

File: 41-552514 Reg: 15083213

PIERRE VIGNET,
Appellant/Protestant

v.

DLMW-BBQ, LLC,
dba Black Bark
1325 Fillmore Street, San Francisco, CA 94115-4112,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: December 7, 2017
Sacramento, CA

ISSUED DECEMBER 27, 2017

Appearances: *Appellant/Protestant:* Pierre Vignet, in propria persona.
Respondent: Monetta White and David Lawrence on behalf of
DLMW-BBQ, LLC. Kerry K. Winters as counsel for the Department
of Alcoholic Beverage Control.

OPINION

Pierre Vignet (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ granting the application of DLMW-BBQ, LLC, doing business as Black Bark (respondent/applicant), for a type 41 on-sale beer and wine license and a type 58 caterer's permit.

1. The decision of the Department, dated April 19, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On December 9, 2014, Respondent DLMW-BBQ, LLC petitioned for issuance of an on-sale beer and wine license and caterer's permit for premises located at 1325 Fillmore Street in San Francisco. Appellant Pierre Vignet filed a timely protest against issuance of the license and requested a hearing.

The administrative hearing was held on February 4, 2016. Documentary evidence was received and testimony was presented by Licensing Representative Joan Bernardino of the Department of Alcoholic Beverage Control and by Monetta White, co-owner of respondent/applicant DLMW-BBQ, LLC. Appellant presented no witnesses, but argued his protest in propria persona.

Testimony and evidence established that Licensing Representative Bernardino investigated the application and recommended issuance of the license subject to several conditions.

In the immediate area of the premises, Fillmore Street is a major street and very busy with vehicle traffic, including cars, trucks, buses, and significant pedestrian traffic. There is a bus stop within 100 feet of respondent's premises. The applied-for site has never previously been licensed by the Department. On December 1, 2015, the Department issued respondent an interim operating permit so that it can currently retail in alcoholic beverages.

Respondent's business is operating as a Southern "bar-b-que" style restaurant, with fast and casual family dining. It opens for business at 11:30 a.m. and closes at 10:00 p.m. daily, except Tuesday, when it is closed. The premises has the capacity for

approximately 70 patrons. The applied-for premises includes a 12' by 15' open-air patio that can hold 15 to 18 patrons.

The restaurant typically has 10 employees on duty. The premises covers approximately 3,500 square feet and is located on the ground floor of what is referred to as the Fillmore Center, a four-block mixed-use development that includes businesses and residents. Above respondent's premises are residential units. Beneath the development are several off-street parking spaces used by the Center's residents and patrons.

During the normal course of business, the premises' main door on Fillmore Street is closed, but unlocked so as to permit ingress and egress of patrons. The same is true for a door connecting the interior of the premises to its open-air patio. There is a small window adjacent to the patio door that can be opened, but respondent has never opened it. The premises' main exterior window faces Fillmore Street and is a fixed picture window, not openable in any fashion.

As there are residents living above respondent's premises, part of respondent's lease agreement required it retain a sound consultant and abide by the consultant's reasonable recommendations regarding the build-out of the premises. One of the sound reduction measures included the installation of added soundproofing material in the ceiling area of the premises.

Respondent's premises and activity fell within existing local zoning parameters and respondent did not need to obtain a conditional use permit from the City and County of San Francisco.

As defined in Business and Professions Code section 23789, four consideration points are within 600 feet of the applied-for premises. The first was the Raymond Kimball Playground between Steiner and Ellis Streets. The second was the St. John Cochrane African Orthodox Church at 1286 Fillmore Street. The third was the Montessori School of the Bay Area located at 1550 Eddy Street. The fourth was the Full Gospel San Francisco English Ministry at 1480 Ellis Street. The Department sent contact letters notifying each of respondent's application, but none responded.

Respondent's premises is located in US Census tract 0159.00. Under the criteria set forth in Business and Professions Code section 23958.4, that census tract is deemed permitted to have 15 on-sale licenses, and 18 have already been issued there. Also, under the criteria set forth in that same section, the San Francisco Police reporting district where the applicant's premises is located, reporting district 543, is a high crime reporting district. The average number of offenses per district was 83, while reporting district 543 has a count of 325.

Under section 23958.4, respondent's premises is in an over-concentrated area. Nevertheless, after conducting an investigation, the Department determined issuance of an added on-sale bona-fide eating place license was appropriate because it served a public convenience or necessity as permitted in section 23958.4(b)(1). In this case, Respondent offers a full-service restaurant with family/casual Southern style "bar-b-que" cuisine not otherwise available in the area.

The Department of Alcoholic Beverage Control specifically notified the San Francisco Police Department's Alcohol Liaison Unit of respondent's application. The

Department of Alcoholic Beverage Control received neither opposition nor protest from the San Francisco Police Department regarding the application.

The premises is within 100 feet of 117 residents. Those residents live at various units located at 1345 Fillmore, 1310 Fillmore, and 1510 Eddy Street, San Francisco. Some of these units sit above the applied-for premises. The Department sent notification letters to each regarding the respondent's application. No response, objection, or protest was received from any of those residents.

Respondent has agreed that if the license is issued, it will be subject to the terms and conditions set forth in the Petition for Conditional License. Among the numbered conditions that will be imposed on the license are the following:

- 1 Sales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. to 12:00 a.m. (midnight) each day of the week.
- 2 Noise shall not be audible beyond the area under the control of the licensee as depicted on ABC-257 dated 11/25/14.
- 3 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) as depicted on the ABC-257 dated 11/25/14.
- 4 Sales, service, and consumption of alcoholic beverages in the outdoor patio area(s) shall be permitted only between the hours of 11:00 a.m. to 10:00 p.m. each day of the week.
- 5 The licensee(s) or an employee of the licensee(s) will monitor the outdoor patio area(s) 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.
- 6 Full meal service must be made available at all times the premises is open, operating and exercising the privileges of its ABC license up to one-half (1/2) hour prior to the cessation of dispensing of alcoholic beverages or to closing.

At the conclusion of its investigation, the Department recommended issuance of the type 41 license and type 58 caterer's permit. The actual license, however, would be limited by and subject to the conditions specified in the Petition for Conditional License.

Appellant/protestant Pierre Vignet is a local area resident who lives with his wife and daughter. Over the past few years, the quiet enjoyment of his home has been disturbed by noise emanating from various business establishments in the area. He has complained many times to local authorities about this problem. He believes the San Francisco noise ordinance is not being enforced by local or state authorities, and the excessive continued noise has caused damage to his family's health. He believes that when he complains to local authorities about the noise problem from certain businesses, those local authorities protect the businesses rather than seek to reduce the excessive noise at its source. He opposed the current application because if he ever had to make an excessive noise complaint against respondent, local or state authorities would not take any effective steps to correct the problem.

After the hearing, the Department issued a decision overruling appellant's protest and allowing the license to issue subject to the conditions included on the Petition for Conditional License.

Appellant then filed this appeal contending the applied-for license will create noise disturbances in the area and will disrupt his quiet enjoyment, to the detriment of his family's health, and that the ALJ did not properly consider the evidence he submitted in support of that claim.

DISCUSSION

Appellant contends the Department decision does not reflect the facts. (App.Br., at p. 1.) Appellant argues issuance of the applied-for license will aggravate significant noise disturbance issues in the area of his residence. (*Id.* at pp. 1-2.) Appellant states that while respondent has agreed to conditions and its representatives have claimed under oath that they keep the premises doors closed, they have in fact kept the doors "widely open." (*Id.* at p. 2.)

Moreover, appellant contends the conditions will be ineffective because the San Francisco Police Department and other local authorities fail to enforce noise ordinances. (*Ibid.*) They direct this Board's attention to evidence of corruption within San Francisco local government, and question the city's integrity and effectiveness at protecting its citizens. (*Id.* at p. 3.)

The Department counters that the binder of documents appellant submitted in support of his case, although properly admitted as administrative hearsay, was irrelevant and lacked evidentiary foundation. (Dept.Br., at pp. 5-7.) The Department further contends that none of these documents show respondent's premises would create a noise problem. (*Id.* at pp. 7-8.) Finally, the Department directs the Board to conditions placed on the license, which are designed to control noise. (*Ibid.*)

Appellant counters that his evidence corroborates the facts, and that the documents he has offered are part of the public domain and readily accessible. (App. Reply Br., at pp. 1-2.) Appellant contends that by suppressing his evidence, the

Department is attempting to strengthen its own case and obscure the truth, including its own lax enforcement. (*Ibid.*)

In essence, appellant is challenging the evidentiary support for the decision: he believes the Department has willfully ignored or discounted evidence of respondent's contribution to noise in the area, the harm the noise causes to appellant and his family, and local authorities' continuing failure to address the problem.

This Board's jurisdiction is limited by the constitution and by statute to the following questions:

- (a) Whether the department has proceeded without, or in excess of, its jurisdiction.
- (b) Whether the department has proceeded in the manner required by law.
- (c) Whether the decision is supported by the findings.
- (d) Whether the findings are supported by substantial evidence in the light of the whole record.
- (e) Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, § 23084; see also Cal. Const., art. XX, § 22.)

This Board is bound by the Department's factual findings absent an abuse of discretion:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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. [Citation.] 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In a protested alcoholic beverage license application, the applicant bears the burden of establishing that it is entitled to an alcoholic beverage license. (*Coffin v. Alcoholic Bev. Control Appeals Bd. (2006) 139 Cal.App.4th 471, 475-476 [43 Cal.Rptr.3d 420]*, extending the holding of *Martin v. Alcoholic Bev. Control Appeals Bd. (1959) 52 Cal.2d 259, 265 [341 P.2d 291].*)

Where, as here, there is an overconcentration of licenses in the census tract or issuance of the license would "tend to create a law enforcement problem," the Department is required to deny the license. (Bus. & Prof. Code, § 23958.) An exception exists, however: where the applicant can show its premises will serve public convenience or necessity, the Department may, at its discretion, grant the license. (Bus. & Prof. Code, § 23958.4(b)(1).)

In this case, respondent's premises are located in a census tract with an undue concentration of alcoholic beverage licenses. (Findings of Fact, ¶ 8.) While the area also has a high crime rate, the San Francisco Police Department neither protested nor otherwise opposed issuance of the license. (Findings of Fact, ¶¶ 8, 10.) The undue concentration of licenses would ordinarily mandate denial of the license, but a Department investigation determined that issuance of the license would serve public convenience or necessity because the premises "offers a full service restaurant with family/casual Southern style bar-b-que cuisine, not otherwise available in the area."

(Findings of Fact, ¶ 9.) Issuance of the license was therefore within the Department's discretion. (See Bus. & Prof. Code, § 23958.4(b)(1).) This Board may only review whether the exercise of that discretion was reasonable.

Appellant does not dispute that the premises would service public convenience or necessity. (See generally App.Br.) Instead, his appeal focuses on the potential for increased noise—particularly from respondent's open premises doors—and on lax enforcement of noise violations by the Department and the SFPD. (App.Br., at pp. 1-2.)

In support of his protest, appellant submitted a binder of documents. (See Exh. P-1.) The binder as a whole was marked for identification and later admitted into evidence as administrative hearsay, with the express caveat that the ALJ would be unable to consider documents not related to this particular license protest. (RT at pp. 96-97.)

The majority of the documents in the binder provide evidence of noise pollution emanating from the establishments around appellant's home (including, among others, the Fillmore Auditorium, Origin Nightclub, and the Boom Boom Room) or of the failure of local and state authorities to enforce applicable laws. (See Exh. P-1, items 1, 3-4, 6-12, 15.) One document, signed by a pediatrician, attests to the harm noise from the Fillmore Auditorium does to appellant's child. (Exh. P-1, item 2.)

These documents do not relate to the operation of respondent's premises in particular; they relate only to noise from previously licensed premises.

Three of the documents, however, do relate to respondent's premises. (See Exh. P-1, items 5, 13, 14.) The first is an email from the Department of Building Inspection

(DBI) stating that it has no records of soundproofing inspection at respondent's premises. (Exh. P-1, item 5.) However, the second sentence of the email states, "For documents pertaining to the 'official confirmation that the following establishments have been inspected and meet the required soundproof standards,' you should contact the San Francisco Entertainment Commission." (*Ibid.*) DBI's inability to produce records does not necessarily indicate that no inspection took place or that no soundproofing measures were taken; it merely indicates that DBI alone was unable to produce such records. The email must be weighed against other evidence.

The other two documents relating to respondent's premises are photographs of the premises' double doors. (Exh. P-1, items 13 and 14.) In both photographs, the doors appear to be propped open. (See *ibid.*) According to appellant, this allows noise to emanate beyond the licensed premises and shows that respondents were lying when they stated that the doors would remain closed. (App.Br., at p. 2; see also Findings of Fact, ¶ 4; RT at p. 83.)

This Board sympathizes with appellant's frustration. We believe his description of the noise from the Fillmore Auditorium and other venues, and we understand the difficulties in eliciting compliance with laws and ordinances aimed at reducing noise.

This Board, however, may only address the present license application. Stated differently, this Board may not punish respondent Black Bark for the noise created by the Fillmore Auditorium or other local businesses, or for the failure of authorities to enforce applicable laws.

Of the documents appellant submitted into evidence, only the three relating to respondent's licensed premises are relevant to this license application. Respondent cannot control the noise emanating from nearby businesses and it cannot control the priorities or conduct of local law enforcement.

In exercising its discretion to grant respondent's license, however, the Department did take appellant's noise concerns into account. The ALJ made the following findings of fact regarding the measures respondent has taken to control noise from its own premises, with citation to the relevant evidence:

4. During the normal course of business, the premises' main door on Fillmore Street is closed, but unlocked so as to permit ingress and egress of patrons. The same is true for a door connecting the interior of the premises to its open-air patio. There is a small window adjacent to the patio door that can be opened, but [respondent] has never opened it. The premises' main exterior window faces Fillmore Street and is a fixed picture window, not openable in any fashion. (Exhibit C, photo A.)

5. As there are residents living above [respondent's] premises, part of [respondent's] lease agreement required it retain a sound consultant whose reasonable recommendations [respondent] had to abide by regarding the build-out of the premises. One of the sound reduction measures included the installation of added soundproofing material in the ceiling area of the premises. (Exhibit B and Exhibit 5, attachment I.)

(Findings of Fact, ¶¶ 4-5.)

Based on these findings, the ALJ concluded that issuance of the license was proper and expressly addressed appellant's concerns:

7. In focusing on the protest, [appellant] asserts that local and state authorities, including the Department, are not actively and effectively enforcing the city's noise ordinance and state law regarding undue noise. Protestant's main concern is that if [respondent] were to be licensed, and then began to cause a noise problem, there would be a laxity of enforcement to remedy that problem. However, the scope of the hearing and this proceeding is limited to determining whether or not issuance of the conditional license to this specific applicant will somehow create or

result in a noise problem for the area. On that issue, [appellant] presented no substantial evidence to support a rational conclusion that if [respondent] were issued the applied for license, its normal operation would generate a noise disturbance to [appellant], or to the immediate neighborhood in general. Rather, as the evidence at the hearing established, the premises is now operating as a bona-fide casual bar-b-que restaurant. It is not an entertainment venue of any sort. It does not have any live entertainment, dancing, or shown to have any use beyond being a restaurant. It occupies a newly renovated retail space where, during the [respondent's] build-out phase, measures were intentionally taken to incorporate noise counter-measures, as there are residents right above [respondent's] retail space the [respondent's] own landlord had an interest in insulating from noise generated from [respondent's] operations. The premises usually operates with its doors and windows in a closed position which would help prevent noise escaping from the interior. The premises is located on Fillmore Street, a busy urban thoroughfare in that part of San Francisco, with busy vehicle and pedestrian traffic, and resulting in the ambient noise they normally generate. If the license were issued, it would be subject to a condition banning noise being audible beyond the area of control of the licensee. The sale, service, and consumption of alcoholic beverages would end daily at 10:00 p.m. on the patio, and 12:00 midnight with respect to the enclosed portion of the premises. As specifically noted in the Petition for Conditional License, a violation of any term in the Petition for Conditional license is a specific ground for suspension or revocation of the license under sections 23800-23805. Lastly, the [appellant] did not present any evidence as to why or how [respondent] might reasonably be expected to cause a noise problem if licensed. Based on the state of the evidence, the [appellant] did not sustain his burden of proof and persuasion that the application should be denied.

(Conclusions of Law, ¶ 7.) The ALJ's review of the evidence—including respondent's soundproofing measures, appellant's noise complaints, and the nature of the surrounding area—was unusually thorough. Issuance of the license over appellant's protest was not an abuse of discretion.

We note, however, that the license does contain a condition providing that "[n]oise shall not be audible beyond the area under control of the licensee." (Petition for Conditional License, condition 2.) Leaving the doors open, without more, is not cause

for discipline. (See generally Petition for Conditional License.) If, however, respondent leaves its premises doors open *and* in doing so allows audible noise to emanate beyond the area of its control, then respondent has committed a condition violation meriting license discipline. (See Bus. & Prof. Code, § 23804; see also Conclusions of Law, ¶ 7.) If that occurs, then appellant, as a citizen, may file an accusation against the respondent—he need not wait for the Department to do so. (See Bus. & Prof. Code, § 24201 ["Accusations may be made to the department by any person against the licensee."]; see also Gov. Code, § 11503 [accusation must include notarized declaration that accusation is true under penalty of perjury].) Of course, any such accusation must be supported by relevant, credible evidence establishing not only that respondent left its doors open—which alone would not constitute a condition violation—but that it has allowed noise to emanate beyond the area under its control.

If appellant produces credible evidence of a condition violation and files an accusation, we expect the Department will treat him fairly, honor its enforcement obligations, and conduct an appropriate good-faith investigation.

ORDER

The decision of the Department is affirmed.²

PETER J. RODDY, ACTING CHAIRMAN
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. 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.