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

AB-9676
File: 48-566437; Reg: 16084823

POS ENTERPRISES,
dba O'Mally Sports Pub
2135 Old Middlefield Way,
Mountain View, CA 94043-2403,
Respondent/Applicant

v.

DONALD LETCHER, Protestant/Respondent

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2018
Sacramento, CA

ISSUED JANUARY 28, 2019

Appearances: *Appellant:* John Kevin Crowley, as counsel for the applicant, POS Enterprises,

Respondents: Donald Letcher, protestant, in propria persona, and Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

POS Enterprises, doing business as O'Mally Sports Pub, appeals from a decision of the Department of Alcoholic Beverage Control[1] denying its application for a

[1]The decision of the Department under Government Code section 11517, subdivision (c), dated December 6, 2017, is set forth in the appendix.

premises-to-premises transfer of its existing on-sale general public premises license to an expanded licensed premises.

FACTS AND PROCEDURAL HISTORY

On February 4, 2016, the applicant petitioned for a premises-to-premises transfer of its existing on-sale general public premises license to an expanded premises which would include the existing licensed building as well as a 36' by 28' patio. The current license was issued on November 24, 2015, and there is no record of Department discipline against the license.

As part of the application process, the applicant executed a Petition for Conditional License in which it agreed to the following conditions should the application be granted:

> 1. Sales, service, and consumption of alcoholic beverages shall be permitted in the patio area only between the hours of 10:00 a.m. and 12:00 midnight, each day of the week.
>
> 2. There shall be no live entertainment of any type on the outdoor patio, including, but not limited to live music, disc jockey, karaoke, topless entertainment, male or female performers or fashion shows.
>
> 3. There shall be no amplified music on the outdoor patio at any time.
>
> 4. There shall be no dancing allowed on the premises.

(Exh. P-7.)

Under the current license, the premises is open 7 days a week from 11:00 a.m. to 2:00 a.m. in a single-story building which is approximately 40' by 75'. The application, if approved, would add an outdoor patio adjacent and to the rear of the existing premises under a new expanded license, with the existing license being cancelled — thereby not adding to the number of licenses in the census tract. The proposed hours of operation would be daily from 10:00 a.m. to 2:00 a.m. indoors, and

10:00 a.m. to 12:00 a.m. midnight outdoors.

A protest was filed by Donald Letcher, and administrative hearings were held on February 1, 2017 and April 4, 2017. Oral and documentary evidence was presented by Department Licensing Representative Jerry Koshimizu; by Department Agents Michael Johns and Matt Elvander; by the licensee, Florence Martin O'Sullivan; and by the protestant, Donald Letcher.

Testimony established that upon receipt of the application, Department Licensing Representative Jerry Koshimizu investigated the application on behalf of the Department. (See Report on Application for License, Exh. 3.) The report notes that the premises complies with local zoning requirements and that the City of Mountain View has already approved a Conditional Use Permit (CUP) authorizing the use of the outdoor patio for the sale and service of alcoholic beverages.

As part of the licensing process, the Mountain View Police Department (MVPD) was notified of the pending application. No objection to the application was filed by the MVPD.

The licensee, Mr. Florence O'Sullivan, outlined some possible measures for maintaining the quiet enjoyment of surrounding residents such as construction of a sound wall between the premises and the protestant, as well as adding an additional self-closing door to the patio to keep sound from escaping from the building. These measures were proposed as possible measures to be undertaken if and when the expanded premises were approved. They were not made a part of the Petition for Conditional License.

As part of the investigation, Licensing Representative Koshimizu, Department Agent Elvander, and Department Agent Johns each visited the premises on multiple

occasions at various times of the day and night. Each of them visited from four to eight times. No excessive noise was observed on these occasions — one of which included Saint Patrick's Day — no litter or blight was observed, no illicit drug use was observed, and no disorderly conduct was observed. It was determined by Koshimizu that the protestant's issues and concerns about noise, litter, illicit drugs, and quiet enjoyment of his residence would be addressed by the Department's conditions, the city's CUP, and existing ABC laws.

Licensing Representative Koshimizu recommended that the application be approved with the applied-for conditions. He concluded that the issues raised by the protestant were either unsubstantiated or were mitigated by the CUP, the Department's conditions, and by statute. (Exh. 3 at p. 7.)

The protestant, Donald Letcher, testified at length about noise from the premises, headlight glare from the parking lot, automobile noise, and complaints he has made to the police — many of which preceded the applicant's ownership of the premises, and concerned previous licensees at the same location. He also testified that he has registered a series of complaints against the City of Mountain View because of a zoning change to his property. As a result of that zoning change he has not been able to rent five residential units on his property since 1997. The property is now zoned for commercial use only.

Mr. Florence O'Sullivan testified that when the applicant purchased the business in 2015, a Department representative indicated to him that the rear patio had been licensed in the past and that the Department would approve its use as part of the licensed premises. The applicant purchased the premises based on that assumption. When the Department informed him that the licensed premises included only the

building and not the patio, he was advised that a separate application would have to be made to license the patio. This is that application process.

O'Sullivan also testified about the various measures undertaken to remedy protestant's concerns, including a roof over the patio — which he previously installed, but later had to remove because it lacked a city permit — as well as a proposed sound wall and additional self-closing door. O'Sullivan also testified that many of the protestant's complaints are actually with the City of Mountain View, but are being misdirected at the applicant. He also testified that neither he nor other neighbors believe that the protestant actually lives at the claimed location.

On March 17, 2017, (after the February 1, 2017 hearing but before the hearing on April 4, 2017) the Department granted the applicant an interim operating permit (exh. P-6), allowing it to exercise license privileges in both the building and on the patio, pending the final outcome of the application process. Also on March 17, 2017, the premises were inspected by representatives of the police department, fire department, and city code enforcement, and, except for removal of some loose items in the patio, they approved the applicant's use of the patio as part of the licensed premises.

On April 28, 2017, the administrative law judge (ALJ) issued his proposed decision, sustaining the protest on the basis that licensing the patio would interfere with the quiet enjoyment of a local resident. The ALJ recommended that the application be denied.

Initially, on June 21, 2017, the Department rejected the proposed decision and asked for additional briefing from the parties. Briefing was submitted. On December 6, 2017, the Department issued its decision under Government Code section 11517(c), adopting the proposed decision in its entirety and denying the application.

Appellant thereafter filed a timely appeal making the following contentions: (1) the decision of the Department is not supported by its findings or by substantial evidence; (2) substantial evidence establishes that the issuance of the license will not interfere with the resident's quiet enjoyment; (3) the Department's decision is arbitrary and constitutes an abuse of discretion; and (4) the Department, in weighing the evidence, did not address the protestant's personal motivations and lack of standing for opposing the issuance of the license. The issues are closely related, and will be treated as a single issue — i.e., was there support in the record for the Department's determination that appellant failed to meet its burden, under rule 61.4, to show that issuance of the license would not interfere with the quiet enjoyment of a residence located within 100 feet of the premises.

DISCUSSION

Was there substantial evidence in the record to support the Department's determination that appellant failed to meet its burden, under rule 61.4, to show that issuance of the license would not interfere with the quiet enjoyment of a residence located within 100 feet of the premises?

Appellant maintains (1) that the decision of the Department is not supported by its findings or by substantial evidence; (2) that substantial evidence establishes that the issuance of the license will not interfere with the nearby resident's quiet enjoyment; (3) that the Department's decision is arbitrary and constitutes an abuse of discretion; and (4) the Department, in weighing the evidence, did not address the protestant's personal motivations and lack of standing for opposing the issuance of the license.

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as

follows:

> 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. [Citations.] 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].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const.

Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises*, *Inc*. *v*. *Dept*. *of Alcoholic Bev*. *Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra,* at 114.)

> Rule 61.4 states, in relevant part:
>
> No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either of the following conditions exist:
>
> (a) The premises are located within 100 feet of a residence.
>
> (b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. . . .
>
> [¶ … ¶]
>
> **Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents.**

(Cal Code. Regs., tit. 4, § 61.4, emphasis added.) Rule 61.4 shifts to the applicant the burden of proving non-interference with the quiet enjoyment of a residence located within 100 feet of the proposed premises.

The Department has a broad discretion with respect to the issuance or denial of a license. As stated in *Koss*:

> [T]he Department exercises a discretion adherent to the standard set by reason and reasonable people, having in mind that such a standard may permit a difference of opinion upon the same subject. **If the decision reached is without reason under the evidence, the action is arbitrary; constitutes an abuse of discretion; and may be set aside.** Where the decision is the subject of choice within reason, the Department is vested with the selection which it deems proper; the action constitutes a valid exercise of that discretion; and the Appeals Board or the court may not interfere therewith.

(*Koss v*. *Dept*. *of Alcoholic Bev*. *Control* (1963) 215 Cal.App.2d 149 [30 Cal.Rptr.219],

emphasis added.)

What troubles the Board in this case is the ALJ's conclusion that the applicant failed to meet its burden of proof under rule 61.4 — in spite of the voluminous evidence supporting the position that it had met its burden of proof. Evidence which was seemingly ignored includes: the conditions recommended by the licensing representative and the findings in his report that the complaints of the protestant would be addressed by them, the conditions contained in the conditional use permit issued to the applicant — satisfying the city's concerns, the conditions set forth in the Petition for Conditional License, and the argument's of the Department's own attorney — all of which support a finding that the burden was met.

We are also troubled by the complete disconnect between the substantial evidence in support of issuing the license in the licensing representative's report — which supports the applicant's argument that it met its burden under rule 61.4 — and the conclusions of the ALJ which entirely disregard the Department's own licensing investigation and report on the subject of what evidence supports a finding that the applicant met its burden.[2] The Department's decision pays the barest of lip service to the recommendations of the licensing representative in his report and how the conditions proposed in the Petition for Conditional License would mitigate the protestant's concerns — thereby satisfying the applicant's burden under rule 61.4.

We agree with appellant that the Department's decision is arbitrary and constitutes an abuse of discretion. "If the decision reached is without reason under the

[2]We note that the Department's brief completely fails to address any of these issues and was singularly unhelpful in analyzing this case. Their Reply Brief addresses only a single issue — whether the protestant had standing — and entirely neglects to address whether the decision was supported by substantial evidence.

evidence, the action is arbitrary; constitutes an abuse of discretion; and may be set aside." (*Koss*, *supra*.)

As this Board observed in *Summit Energy Corporation California* (2001) AB-7585, at p. 9:

> The Appeals Board knows from having reviewed many cases implicating Rule 61.4 that the Department frequently approves the issuance of a license even though the premises may be within 100 feet, or closer, to a residence or residences. In so doing, the Department ordinarily reviews conditions included with the applicant's petition, and sometimes engrafts additional conditions which, if accepted by an applicant, result in the overruling of protests.

In its Conclusions of Law, the decision specifically finds that most of the protestant's assertions were unfounded in regards to the premises being a law enforcement problem. (CL ¶ 4.) The decision also notes that the protestant's complaints about noise, fighting, disturbances of the peace, and loitering were similarly unfounded. (CL ¶ 8.) Indeed the ALJ's decision goes on to present a number of points which support the applicant's position that it met its burden of proof — yet inexplicably reaches the conclusion that it did not. This is the very definition of arbitrariness, when the ALJ's own findings support a different conclusion than the one actually reached.

The decision notes that the MVPD was contacted on two occasions and that it did not submit any opposition to the expanded premises. (*Ibid*.) Ordinarily, in our experience, input from law enforcement is given significant weight in such licensing matters. The decision also notes that the city issued a Conditional Use Permit authorizing use of the building and adjacent patio for a full service bar, and that this CUP imposed numerous conditions. (*Ibid.;* CL ¶ 14.)

Similarly, the decision notes the visits by three Department representatives who failed to observe any objectionable activity or disturbances on multiple occasions at

various times of the day and night — including Saint Patrick's Day, presumably the biggest day of the year for an Irish bar. (FF ¶¶ 18-20.) The Department's own representative recommended the addition of four conditions — agreed to by the applicant in its Petition for Conditional License — to address the existence of a rule 61.4 resident. (Exh. 3.) The Department itself issued an interim operating permit to use the patio, and the premises was inspected and approved by all the appropriate agencies from the City of Mountain View — including police, fire and code enforcement, (FF ¶ 29.) And, finally, the Department's own counsel at the administrative hearing argued that the premises-to-premises transfer should be approved, subject to the recommended conditions. (RT Vol II, at p. 207.)

Ignoring all of the evidence in support of the applicant's position that it had met its burden of showing that the premises-to-premises transfer would not interfere with the quiet enjoyment of a single nearby resident — and ignoring both the recommendation of the Department's licensing representative, as well as the arguments of the Department's own attorney at the administrative hearing, that the license should be issued, subject to conditions — the decision finds that the applicant failed to establish that operation of the expanded premises would not interfere with the quiet enjoyment of a single resident whose property is within 100 feet of the proposed premises.

Specifically, the decision notes that noise from the patio and lights from the parking lot have disturbed the protestant in the past (CL ¶ 12); that there is no roof on the patio (CL ¶ 16); the proposed self-closing door has not yet been installed (CL ¶ 17); and the proposed sound wall has not yet been constructed (CL ¶ 18). The decision finds that since the measures proposed by the applicant to ensure quiet enjoyment have not been implemented, and could not be implemented, the protest should be

sustained.

The decision fails to explain why the noise and light noted in Conclusions of Law paragraph 12 overrides the sworn testimony of its own Licensing Representative and two of its agents that noise and light were not observed to be a problem when they each visited the premises, on four to eight different occasions, at various times of the day and night. Further, the decision fails to explain why the proposed door and wall — which were not made a part of the Petition for Conditional License and which were only discussed as possibilities to be pursued after the license was approved — could be the basis for denying the premises-to-premises transfer. If these items were a prerequisite for approval, why were they not included as requirements or conditions in the Petition for Conditional License? The decision is simply not supported by substantial evidence.

Appellant maintains the Department placed inappropriate weight on the testimony of a single protestant, whose motive in opposing the application was fueled by animosity towards the City of Mountain View for its zoning, and who lacked standing to oppose the issuance of the license. The licensee, O'Sullivan, testified credibly that he does not believe the protestant actually lives at this location (RT Vol. I, at p. 90); he also told the protestant during the hearing "all your neighbors say you don't live there" (RT Vol II, at p. 206); he quoted nearby auto shop employees as saying "he doesn't even live there" (RT Vol. II, at p. 182); and he testified that "the protestant's car pulls in the morning and leaves at night" (RT Vol II, at p. 184).

The ALJ nevertheless found that the residence at issue here is owned and occupied by the protestant — giving him standing. (FF ¶15.) The Board, unfortunately, is prohibited from making a contrary finding on the issue of whether or not the protestant actually resides within 100 feet of the premises — we must accept that

factual finding. Furthermore, it is the Department's position that "nothing in the rule requires that a protestant be one of the people who lives within that 100 foot radius." (DRB at p. 2.) We question that interpretation, but we will address that issue at another time — if and when it is raised as an actual issue. Nevertheless, we accept the ALJ's finding that the protestant has standing.

Even though the Board is bound by the findings in the decision in regards to standing, it is evident from the record that this protestant has larger issues than simply the patio in question here. Testimony established that the protestant has had ongoing issues with the City of Mountain View on the same issues regarding quiet enjoyment at this location for many years, (RT Vol. I at pp. 148; 154) and that he has been protesting bars at this location since 1991 (RT Vol II at p. 80) — long before the current licensee took over in 2015. O'Sullivan testified that the police came to the premises ten times on Saint Patrick's Day 2017 — all in response to calls from this one individual — but that the police found no issues on any of their visits, and the premises was never cited. The protestant was finally told by the dispatcher that day to stop calling. (RT Vol II at pp. 168-169.) Even the protestant himself was heard to admit at the hearing that he "might be exaggerating." (RT Vol II at p. 126.) The protestant complains, for example, about live music, but then admits the building is soundproof and that when the back door is shut there is no problem. (RT Vol II at p. 80.)

We agree with the applicant that this protest should be viewed as vexatious and frivolous. A protest will be deemed "frivolous" when protested for an improper motive — to harass the respondent, for purposes of delay, or when lacking merit. (*Crews v. Willows Unified School Dist*. (2013) 217 Cal.App.4th 1368, 1381 [159 Cal.Rptr.3d 484].)

All of this leads us to conclude that the Department acted arbitrarily in this matter

and that the decision is not supported by substantial evidence. It is well known that off-sale licenses are often granted by the Department, subject to conditions similar to those in the Petition for Conditional License here. Furthermore, the Board must assume such conditions have proven effective in eliminating or minimizing any problems that might disturb residential quiet enjoyment, or the Department would have discontinued their use long ago, and the Licensing Representative and Department counsel would not have recommended issuance of this license with conditions. Why, then, in a case with so much substantial evidence supporting the issuance of this license with conditions to address the issue of quiet enjoyment, were these proposed conditions dismissed out of hand by the ALJ? Even the Department's own attorney at the hearing stated during his closing argument, "the Department requests that the license be issued with conditions." (RT Vol II, at p. 207.)

As this Board said in *Summit Energy*, *supra*, at p. 11:

> The Department must, and should, take a broader view than any single protestant, and must draw upon its expertise when determining what may flow from the issuance of a license. If a Rule 61.4 protestant's objection is treated as a veto, then any application for a license which could be granted with appropriate conditions would die stillborn.

The Board further noted in that case that whether or not any license ultimately issues is dependent upon the Department's discretion, reasonably exercised. We do not believe the Department exercised reasonable discretion in this case when it adopted a proposed decision that was not supported by substantial evidence — ignoring the recommendations of both its own Licensing Representative and its own legal counsel that the license for an expanded premises be issued, subject to conditions — and instead gave veto power to a single protestant, whose motives for opposing the license have reason to be questioned. Substantial evidence supports a finding that the

applicant met its burden to show that the operation of the business would not interfere with the quiet enjoyment of this nearby resident.

The decision reached here is without reason under the evidence, making the decision to deny the premises-to-premises transfer entirely arbitrary, and constituting an abuse of discretion. Under the guidance of *Koss*, *supra*, such a decision must be set aside.

ORDER

The decision of the Department is reversed.[3]

BAXTER RICE, CHAIRMAN
MEGAN McGUINNESS, 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.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PROTEST OF: Donald Letcher, Against the Issuance of a Type-48 License to: POS Enterprises Dba O'Mally Sports Pub 2135 Old Middlefield Way Mountain View, CA 94043-2403 Petitioner(s)/Applicant(s).	**File No.: 48-566437** **Reg. No.: 16084823**

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on December 6, 2017, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on February 1 and April 4, 2017, before Administrative Law Judge David W. Sakamoto, and the written arguments of the parties, and good cause appearing, the following is hereby adopted:

ORDER

The proposed decision of the Administrative Law Judge dated April 28, 2017, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: December 6, 2017

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any parly may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PROTEST OF:	}	File: 48-566437
	}	
Donald Letcher,	}	Reg.: 16084823
	}	
Against The Issuance Of A Type-48 License To:	}	License Type: 48
	}	
POS Enterprises	}	Word Count Estimate:
Dba O'Mally Sports Pub	}	2-1-2017: 42,447
2135 Old Middlefield Way	}	4-4-2017: 37,126
Mountain View, CA 94043-2403	}	Reporter:
	}	2-1-2017: Debra Burnham, CSR
Petitioner/Applicant	}	4-4-2017: Linda S. Kirby, CSR
	}	California Reporting
	}	
Under the Alcoholic Beverage Control Act	}	**PROPOSED DECISION**

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in Mountain View, California, on February 1, 2017, and in San Jose, California, on April 4, 2017. Oral and documentary evidence was heard and received. The matter was argued and submitted for decision on April 4, 2017.

Heather Hoganson, Attorney III, represented the Department of Alcoholic Beverage Control (hereafter, "the Department") on February 1, 2017.

Sean Klein, Attorney III, represented the Department of Alcoholic Beverage Control (hereafter, "the Department") on April 4, 2017.

Mr. Florence O'Sullivan, Secretary of Applicant/Petitioner-POS Enterprises, represented Applicant/Petitioner as a self-represented litigant. (hereafter "Applicant")

Mr. Donald Letcher, the protestant, appeared at the hearing. (hereafter "Protestant") He was a self-represented litigant and allowed to appear and participate in the hearing as a party pursuant to California Government Code section 11500(b).[1]

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[1] All future section references are to the California Business and Professions Code unless noted otherwise. All references to rules are to those sections contained within California Code of Regulations Title 4, Division 1, unless noted otherwise.

ISSUES TO BE DETERMINED

The issues to be determined are whether granting the applied-for license would be contrary to public welfare or morals by reason of Article XX, section 22 of the Constitution of the State of California and Business and Professions Code section 23958 because issuance of the license would: 1) create or aggravate interference with a nearby resident's quiet enjoyment of his home by generating or facilitating excessive patron noise, fighting, disturbances, loitering, and cause undue disturbances from patrons' motor vehicle noise and their head lights; and 2) be contrary to California Code of Regulations, Title 4, Division 1, Article 11, section 61.4, commonly referred to as "Rule 61.4", because Applicant's premises or its parking lot is within 100 feet of residents.

FINDINGS OF FACT

1. On November 24, 2015, the Department issued Applicant herein, POS Enterprises, a Type-48 On-Sale General Public Premises license for a business already operating as O'Mally's Sports Pub at 2135 Old Middlefield Way, Mountain View, California.[2] Applicant purchased the on-going business from the prior licensee-owner.

2. Under Applicant's current license, the licensed premises is in a single story free-standing building, approximately 40'wide and 75' long. It is in the block that lies southwest of the intersection of Old Middlefield Way, that runs east and west, and Rengstorff Avenue, that runs north and south.

3. On February 4, 2016, Applicant herein applied to transfer its license to an expanded licensed premises which would include both the originally licensed single story building and adding a rear open-air patio adjacent to the south wall of the existing licensed premises building. Applicant's request to expand the existing licensed premises is occurring by way of a premises-to-premises license transfer application. (Exhibit 3, page 1, box 13) The licensee, POS Enterprises, remains unchanged. The Department's Licensing Representative Jerry Koshimizu investigated the application on behalf of the Department.[3] (hereafter, L.R. Koshimizu) It is the premises-to-premises transfer application that is the subject of this protest hearing.

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[2] A Type-48 license permits the holder to sell and serve beer, wine, and distilled spirits for consumption on the premises. People under 21 are not permitted to enter and remain on the premises, though there are some narrow exceptions to this rule not particularly relevant to this application matter.

[3] Licensing Representative Koshimizu testified at the hearing regarding his investigation. The primary report and a supplemental report he produced reflecting his investigation, Exhibit 3 and Exhibit 4, were admitted as evidence.

4. If Applicant's application is granted, the existing licensed building and patio will be deemed one licensed premises. The license covering only the building would be canceled so issuance of a new license to the expanded premises would not add to the number of licensed premises in the census tract or immediate area.

5. The patio sought to be licensed is approximately 36' wide by 28' long, and has a capacity of approximately 50 persons. Its northerly side is immediately adjacent to the most southerly wall of Applicant's currently licensed building. The patio is enclosed by 7' tall wood plank fencing on its south and west sides. The east side of the patio is bordered by a fixed wall of an adjacent strip shopping center building. The main public entrance to the patio is through a doorway that is on the south wall of the premises building and opens into the patio area. On the west side patio wood fencing, there is a wrought-iron gate that is only to be used as an emergency exit from the patio to the parking lot. The patio's south border wood fencing also has an emergency exit doorway that faces south in the general direction of Protestant's residence. The patio has no roof or covering of any kind.

6. During the application process, Applicant executed a Petition for Conditional License wherein it agreed that, among other things, the following conditions would be imposed on the license if its application was granted[4]:

1. Sales, service, and consumption of alcoholic beverages shall be permitted in the patio area only between the hours of 10:00 a.m. and 12:00 midnight, each day of the week.

2. There shall be no live entertainment of any type on the outdoor patio, including, but not limited to live music, disc jockey, karaoke, topless entertainment, male or female performers or fashion shows.

3. There shall be no amplified music on the outdoor patio at any time.

4. There shall be no dancing allowed on the premises.

7. Currently, the existing licensed bar within the building is open 7 days a week from 11:00 a.m. to 2:00 a.m. of the following day. It covers approximately 3,100 square feet. There is one full time employee and seven part-time employees.

[4] The Petition for conditional license also indicates that: the conditions will be carried forward for any transfer of license at this premises; a copy of the conditions will be retained on the premises and presented to any peace officer upon their demand; and acknowledges that violation of any of the conditions shall be grounds for the suspension or revocation of the license.

There is a premises manager. Live entertainment in the form of karaoke occurs on Thursdays nights from approximately 9:00 p.m. to midnight. On Friday and Saturday nights, local bands provide live entertainment from 9:00 p.m. to midnight.

8. The neighborhood around the applied for premises is a mix of commercial and residential uses. On the same parcel as Applicant's premises, but housed in a separate building, are a machine shop and an auto repair garage. Applicant's premises building is on the northern portion of the parcel and the auto and machine shop are both housed in a building on the southern portion of the parcel.

9. The Department originally issued a Type-48 license covering Applicant's building in 1990. There was no evidence the Department ever licensed the rear patio in the past.

10. From 1990 to 2014, the Department imposed two 15 day disciplinary suspensions against Frances Marie Iten, a prior licensee. There was no discipline imposed against any successor licensee, including Applicant herein.

11. The applied for site, including both the building and patio, complies with local zoning requirements. In a 2013 conditional use permit from the City of Mountain View, it approved use of the building and patio for the sales and service of alcoholic beverages. The conditional use permit has numerous restrictions, terms, requirements, and conditions on use of the property as a bar with a patio.[5]

12. The applied for premises is in United States Census Tract #5093.04 and has a population of 2,871 persons. Applying the criteria and definitions specified in section 23958.4, that census tract is permitted 3 on-sale licenses and 6 have been issued. If Applicant's application is granted and the license issued, Applicant's current Type-48 license would be canceled. The newly issued license would not add to the number of licenses in the census tract or immediate area, but merely replace the canceled license. Therefore, issuance of the license would neither create nor add to an undue concentration of licenses in this census tract or immediate area.

13. From March 18, 2015, to March 17, 2016, there were 23 various calls for police service to Applicant's premises. Five of the 23 calls were for excessive noise.[6]

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[5] A copy of Mountain View's conditional use permit is in Exhibit 3, attachment C.
[6] An abstract of the calls prepared by L.R. Koshimizu is in Exhibit 3, attachment D.

14. On February 4, 2016, the Department notified the Mountain View Police Department of the application. (hereafter "MVPD") On March 1, 2016, L.R. Koshimizu followed up with MVPD Sergeant Avrillo to determine if the police department objected to or opposed Applicant's application. L.R. Koshimizu did not receive any protest or opposition from the MVPD against the application.

15. There is one residence within 100 feet of Applicant's premises. It is owned and occupied by Protestant herein, Donald Letcher. His residence is approximately 50 feet from, and generally south of, Applicant's patio. A 6 foot tall chain link fence with inserted vertical slats divides the Letcher property from a small section of the bar's parking lot nearest to, and generally south of, the applied for patio. The Protestant's property also contains five additional rental units which have been vacant since approximately 1997.[7]

16. In December 2016, the City of Mountain View opened Heritage Park. It is approximately 300 feet from Applicant's patio and is separated from it by Protestant's property and North Rengsdorff Avenue. The park consists of an open area with grass and trees, but has no playground equipment of any kind.

17. No churches or hospitals are in the immediate vicinity of Applicant's premises. There are no public playgrounds or non-profit youth facilities within 600 feet of Applicant's premises. A facility called the Art School of San Francisco Bay was within 600 feet of Applicant's premises. It was in an adjacent small strip mall building. No objection or protest was filed by that school against Applicant's application. From information gathered by L.R. Koshimizu, it appeared the school was a small private enterprise in the business of providing private arts and crafts lessons to children and adults. There was no indication it was a public school or private school providing general instruction. The Protestant did not allege the presence of the school as a ground for denial of the application. It did not appear that issuance of the applied for license would interfere with the normal operation of that facility.

18. L.R. Koshimizu personally inspected the applied for premises and surrounding area on two occasions in 2016 and two occasions in 2017. He did not witness any litter, disorderly conduct, evidence of narcotics activity, or excessive noise coming from Applicant's premises.

[7] The rental units have been vacant since 1997 due to what the Protestant described as either a change of zoning of the property making it illegal for him to rent out the units or that the city wanted changes to those units that he did not/could not accomplish. However, he added he lawfully occupies a cottage on that parcel.

19. Alcoholic Beverage Control Agent Michael Johns also visited the premises on four to eight occasions from February 2015 through January 2017. During his visits, always between 9:00 p.m. and midnight, he did not observe any violations. He did not hear any loud or excessive music or noise from Applicant's bar.

20. On March 17, 2016, Alcoholic Beverage Control Agent Matthew Elvander visited the premises to determine if it was the source of any problems, such as intoxicated patrons, disorderly conduct, excessive noise, or loud music coming from the premises. He detected no such problems. In May 2016, and October 2016, he made added visits to ascertain if the bar was causing any problems, but observed none.

21. The Protestant, Donald Letcher, testified that noise from patrons in the patio have disturbed him when it was used in the past.[8] He testified patrons would yell or scream. Sometimes patrons would loiter and drink alcoholic beverages outside the fenced patio area or in that part of Applicant's parking lot closest to his home. He also testified that when the bar's patrons parked their cars in those spaces nearest his residence, the cars' noise and glare of their headlights disturbed him. The Protestant also observed that sometimes those same spaces were taken up by cars in for repair at the car repair shop that is on the same parcel as Applicant's bar.[9] The Protestant acknowledged that the licensed premises building seemed very sound proof, unless the rear patio door was opened as that would permit noise or music to escape to the premises' exterior. The Protestant also testified there were two licensed premises in the adjacent small strip shopping center and that a school of some sort was also there.

22. The Protestant also had a series of complaints and issues against the City of Mountain View. For example, he testified that since approximately 1997, due to a zoning change the city made on the use of his land, he has not been able to rent five residential units on the parcel where he lives. He testified that when he called the police on complaints he had against Applicant's premises, responding police officers were not specifically aware of conditions on Applicant's conditional-use permit but were only aware of conditions placed on ABC licenses.[10] He also indicated that due to the high volume of calls he made to the police and other city officials over the years on various issues, he felt the City now essentially ignores him.

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[8] The Protestant, Donald Letcher, testified at length in support of his protest.

[9] Protestant also complained that parking spaces on the entire parcel where Applicant's bar is located are insufficient or misallocated and do not meet the city's requirements. However, the parking standards are beyond the scope of ABC's jurisdiction and the City of Mountain View issued a conditional use permit for use of Applicant's premises as a bar with adjacent patio.

[10] Protestant expressed his desire that the conditions on the city's use permit be duplicated on the ABC license due to his fear that the city will not enforce the conditions on its own permit.

23. Applicant's Secretary, Mr. Florence O'Sullivan, testified that when Applicant purchased the business in 2015, an ABC representative indicated to him the rear patio was either licensed or had been licensed in the past and the Department would approve its use as part of the licensed premises. Applicant purchased the premises on that assumption. In 2015, when the initial application for license transfer was approved, the Department informed him the licensed premises included only the building and did not include the rear patio. O'Sullivan was informed that if he wanted the patio licensed for alcoholic beverages, he would have to make another application, which he did. The latter application is the subject matter of this hearing.[11]

24. During the course of the current application, Applicant became aware Protestant complained about the noise and headlights from bar patrons' cars that parked in those parking spaces nearest Protestant's yard and residence. In an attempt to remedy that situation, Applicant made an informal arrangement such that the auto repair shop operator could park cars overnight in those three to five spaces, thus they would not be available for use by the bar's patrons and eliminate the car noise and headlight problem. However, the City of Mountain View disapproved of that practice because that necessarily eliminated the total number of required parking spaces for the bar's patrons.

25. Applicant also recently attempted to mitigate noise that might be generated in the patio by installing a lattice style roof over it. Based on an initial representation from a local code enforcement officer, Applicant believed no city permit was required to install such a roof and he proceeded with the work. The roof was nearly all installed by April 2017, however, the City of Mountain View notified Applicant that such project required appropriate city permits which had not been granted, so Applicant removed the roof. Applicant intends to pursue issuance of the needed permits and re-install a lattice style roof over the patio.

26. Also during the application process, Applicant proposed that a solid sound wall be installed to replace the chain link fence that currently divides Protestant's property from Applicant's leased premises property and parking lot.[12] Applicant approached his landlord offering that Applicant would incur the actual labor costs of installation/construction of the wall if the landlord would obtain needed permits and pay for the materials. Applicant's landlord did not agree with that proposal, and there are no current plans to construct any solid wall to replace the chain link fencing.

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[11] On March 17, 2017 the Department issued Applicant an interim operating permit permitting use of the patio as part of the licensed premises.

[12] There were no details provided as to the dimensions, design, or composition of the proposed wall.

27. Applicant also proposed installation of a second redundant door to the patio area from the existing licensed bar building so as to reduce noise generated inside the building from going outside the building.[13] Applicant remains willing to install such a door, but has not yet done so pending the outcome of the premises-to-premises transfer application.

28. Applicant testified he attempted to take what steps he could to address Protestant's concerns, and asserts many of Protestant's complaints are actually with the City of Mountain View, but are being misdirected at Applicant. Applicant indicated that, to its knowledge, it has never been cited by any city entity for any violation since it has operated the licensed premises.[14]

29. On or about March 17, 2017, St. Patrick's Day, the Department granted Applicant an interim operating permit that allowed Applicant to exercise license privileges in the building and patio pending the final outcome of the application process.[15] On March 17, 2017 the police department, fire department, and code enforcement representatives inspected Applicant's premises and, but for the removal of some loose items in the patio, approved Applicant's use of the patio as part of the licensed premises.[16]

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution delegates the exclusive power to license the sale of alcoholic beverages in this state to the Department of Alcoholic Beverage Control.

2. In a protest matter, the applicant bears the burden of establishing that it is entitled to an alcoholic beverage license from the start of the application process until the Department makes a final determination.[17] However, a protestant has their own burden of proving up the merits of their protest.

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[13] It is assumed that this type of doorway would be such that a user would have to sequentially pass through each door to enter and exit so that only one door is open at a time.
[14] Applicant indicated the police visited his premises at least 10 times on March 17, 2017, St Patrick's Day, indicating they were responding to a complaint, but no violations were found, and no citation was ever issued to Applicant.
[15] Section 24044.5 permits the Department to issue interim operating permits (IOP) to applicants upon certain terms and conditions. An IOP permits an applicant to exercise privileges of the license being applied for pending the final outcome of the application process.
[16] The assorted items were temporarily placed outside the patio. By April 1, 2017 they were all permanently disposed of.
[17] *Coffin v. Alcoholic Beverage Control Appeals Board*, 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420, (2006).

3. Business and Professions Code section 23958 requires 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. Under section 23958.4(b)(2) and applying the criteria for over-concentration set forth therein, even if issuance of an on-sale license would create or add to an undue concentration of licenses, the Department may still issue an on-sale general license if the local governing body determines that public convenience or necessity would be served by issuance of the added license.

4. In this instance, there was insufficient evidence that issuance of the license would create a law enforcement problem. While there was evidence of some police calls to the premises and disturbance to a nearby resident, the local law enforcement agency neither opposed nor protested this premises-to-premises transfer application. Also, the City of Mountain View specifically approved the site for a bar with adjacent patio.

5. If Applicant's premises-to-premises transfer is granted, its existing license would be canceled. The net number of on-sale licenses in the census tract and immediate area would remain the same. Issuance of the new on-sale license would neither add to the number of on-sale licenses in the census tract or in the area generally nor create nor add to an undue concentration of licenses. Therefore, under section 23958.4, the local governing body did not have to make a specific finding that issuance of the license would serve "public convenience or necessity."

6. Under section 23789(a) "The department is specifically authorized to refuse issuance, other than renewal or ownership transfer, of any retail license for premises located in the immediate vicinity of churches and hospitals." Under section 23789(b) "The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within at least 600 feet of schools and public playgrounds or non-profit youth facilities, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls. This distance shall be measured pursuant to rules of the department".

7. There were neither any churches nor hospitals in the immediate vicinity of the applied for premises. There were neither public playgrounds nor non-profit youth facilities within 600 feet of Applicant's premises. One art school was in a nearby strip shopping center, but it was not a ground of protest by Protestant. The school itself neither protested nor objected to the application. The evidence did not otherwise establish that Applicant's normal operations would unreasonably interfere with that facility.

8. There was not sufficient evidence to sustain Protestant's general claim that issuance of the license would necessarily create or aggravate excessive patron noise, fighting, disturbances of the peace, and mass loitering. While the Protestant experienced varied disturbances over the years with respect to this premises the city has seen fit to issue a conditional-use permit to authorize use of the building and adjacent patio for a full service bar. Further, the Department notified the MVPD on two occasions regarding this application and it did not submit any opposition or protest against issuance of the license. The Department also visited the premises on several occasions and did not witness any objectionable activity or disturbances.

9. California Code of Regulations, Title 4, Division 1, Article 11, section 61.4 (commonly referred to as Rule 61.4) provides that in cases involving an application for an original retail license or the premises-to-premises transfer of a retail license, no such license shall be issued if the premises or its parking lot is located within 100 feet of a residence. However, if the applicant establishes that operation of the business, if licensed, would not interfere with those residents' quiet enjoyment of their property, a license may be granted.

10. The evidence was clear that, within the meaning of Rule 61.4, there was at least one residence, that belonging to and occupied by the Protestant herein, that was within 100 feet of Applicant's applied for patio and that a portion of Protestant's property was immediately adjacent to a portion of Applicant's parking lot. Therefore, under Rule 61.4, the issue was whether "...the applicant establishes the operation of the business would not interfere with the quiet enjoyment of the property by residents."

11. Rule 61.4 is clearly focused on the protection of nearby residences and was specifically mentioned in the protest as a ground to deny this premises-to-premises transfer application. In this instance, the applied for premises would operate as a Type-48 On-Sale General public premises allowing the sale, service, and consumption of beer, wine, and distilled spirits on the premises, including an open air patio that could hold up to 50 patrons. Currently, the bar is open 7 days a week from 11:00 a.m. to 2:00 a.m., of the following day. On Thursdays, Fridays, and Saturdays it regularly offers live entertainment from approximately 9:00 p.m. to midnight.

12. The evidence established that, in the past, when the patio was used, it was the source of disturbance to the Protestant due to noisy or unruly patrons and the noise and lights from cars parking adjacent to Protestant's property. Protestant's residence is approximately 50 feet south of Applicant's patio and there is only 6 foot tall chain link fence that divides Applicant's parking lot from Protestant's property and residence.

13. To address the existence of Rule 61.4 residents, Applicant agreed to certain conditions being added to the license if the application is granted. Those conditions are as follows:

1. Sales, service, and consumption of alcoholic beverages shall be permitted in the patio area only between the hours of 10:00 a.m. and 12:00 midnight, each day of the week.

2. There shall be no live entertainment of any type on the outdoor patio, including, but not limited to live music, disc jockey, karaoke, topless entertainment, male or female performers or fashion shows.

3. There shall be no amplified music on the outdoor patio at any time.

4. There shall be no dancing allowed on the premises.

14. The City of Mountain View imposed numerous conditions in its conditional use permit that allows the premises, including the patio, to conduct the business of retailing in alcoholic beverages. (Exhibit 3, attachment C) While these conditions were not necessarily targeted at protecting residents pursuant to Rule 61.4, Applicant's adherence to them would aid in that goal. For example, live entertainment is restricted to Thursday, Friday, and Saturday from 5:00 p.m. to 1:30 a.m. Dancing is also banned at the premises. Consistent with the Department's condition, the patio can only be used from 10:00 a.m. to midnight, and no music or live entertainment is permitted on the patio. All premises doors and windows must be closed when the premises is in operation to reduce the transmission of noise. A video surveillance system is required. For every live event, three security guards are required, one on the Old Middlefield side of the business, one assigned to the parking lot, and a third assigned to the patio area. The City also required alcohol training of employees. Though most of these conditions are not duplicated on the ABC license, Applicant must still adhere to them.

15. While the ABC and city conditions do restrict usage of the patio area, the patio still has no ceiling or cover to help contain noise that comes from it. If the patio were licensed, up to approximately 50 patrons would be able to use it to socialize and consume their alcoholic beverages up to midnight daily.

16. Unfortunately, while Applicant recently installed nearly all of a patio ceiling or covering, as no city permit had been issued for its installation, it had to be removed. However, the fact remains there is still no ceiling over the patio that would help contain noise generated in the patio itself or that might escape from the interior of the licensed bar building when the building's patio door is open.

17. Additionally, in the written statement Applicant submitted to the Department that addressed how operation of the premises would not interfere with nearby residents, Applicant discussed the installation a second self-closing door to help trap noise that might otherwise escape from inside the premises building when the door is opened. (Exhibit 3, attachment F) Part of the Department's reason for finding that issuance of the license would be appropriate presumed those items listed in Applicant's letter were implemented. As of the hearing, no second door had been installed. There was no evidence that such type of doorway is permitted by local ordinance, rule, or regulation or, as a practical matter, would be feasible to install and maintain.[18]

18. Lastly, also in the statement Applicant submitted to the Department that addressed how operation of the premises would not interfere with nearby residences, Applicant indicated it would or could construct a sound wall on some or all of the property line between Applicant's property and Protestant's property replacing some or all of the current chain link fencing now dividing the two properties. (Exhibit 3, attachment F) However, during the hearing, Applicant testified its landlord rejected the proposal to install such a wall. Therefore, no wall is planned. In Exhibit 3, page 3-4, the Department stated its position that issuance of the license would be appropriate if the measures taken in Applicant's letter to address residential non-interference were fulfilled. But, the evidence was that no such sound wall as proposed in Applicant's letter will be built.[19] Similar to the secondary rear door and patio covering, had such wall already been lawfully installed, it would have likely aided Applicant in fulfilling its burden under Rule 61.4 of demonstrating that operation of its premises would not interfere with the quiet enjoyment of nearby residents of their homes.[20]

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[18] ABC has no knowledge, experience, or expertise as to the construction and installation of such secondary doorway systems and their efficacy at containing noise.

[19] If a solid sound wall was built, it would likely also address the Protestant's problem with noise and headlight glare of those patrons who would park their cars in those parking spaces closest to Protestant's residence.

[20] Although L.R. Koshimizu testified that he would have recommended issuance of the license even if the wall was not built.

19. Based upon the evidence and discussion above, Protestant did not sufficiently establish that issuance of the applied for license would regularly create or result in excessive patron noise, fighting, illegal drug use, or other extreme disturbances. To that extent, the Protestant's protest was not sustained.

20. However, in light of Rule 61.4's clear emphasis on preserving the quiet enjoyment of those whose residences are within 100 feet of applied for premises, Applicant did not sufficiently fulfill its own burden to show that operation of its applied for expanded premises would not interfere with the quiet enjoyment of a resident whose home is within 50 feet of Applicant's applied for premises. To that extent, the Protestant's protest was sustained.

ORDER

Applicant's request for a premises-to-premises transfer of its license to an expanded licensed premises is denied.

Dated: April 28, 2017.

David W. Sakamoto
Administrative Law Judge

☐ Adopt

☒ Non-Adopt: _____

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By: _____

Date: 6/21/17