

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

AB-9833

File: 21-593175; Reg: 19088441

**BARRY GAUTHIER,
Appellant/Protestant**

v.

**GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #11111
390 North Brea Boulevard
Brea, California 92821-4005,
Respondents/Applicants**

and

**DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent**

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: March 5, 2020
Los Angeles, CA

ISSUED MARCH 19, 2020

Appearances: *Appellant/Protestant:* Barry Gauthier, in propria persona,

Respondents: Adam Koslin, of Solomon, Saltsman & Jamieson, as counsel for applicants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC; and Alanna K. Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Barry Gauthier appeals from a decision of the Department of Alcoholic Beverage Control (the Department)¹ which granted the application of Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #11111, for an off-sale general license.

¹ The decision of the Department, dated July 30, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On April 19, 2018, the applicants petitioned for issuance of an off-sale general license.

A protest against the issuance of the license was filed by appellant (and others) and an administrative hearing was held on April 30, 2019. At that hearing, oral and documentary evidence was presented by Department Licensing Representative Roxana Zaharia, land use specialist Anna Lambropoulos, CVS store manager Stephen Weed, and appellant/protestant Barry Gauthier.

Testimony established that the premises has never previously been licensed through the Department. During the application process, the Department issued an Interim Operating Permit (IOP) on November 20, 2018, and a second IOP on March 21, 2019. There have been no complaints or accusations against the premises.

The premises was required to obtain a Conditional Use Permit (CUP) prior to applying for an alcoholic beverage license. The Brea Planning Commission approved the applicants' CUP on June 27, 2017, and communicated this information to the Department by letter on August 15, 2018. The planning commission made a determination that the sale of alcoholic beverages at the premises would not adversely affect the public, health, safety, or general welfare. It deferred the determination of public convenience or necessity to the Department. The Brea Police Department did not oppose or object to the issuance of the license.

After the hearing, the administrative law judge (ALJ) issued a proposed decision on May 23, 2019, recommending that the Department deny appellant's protest and allow the license to issue, subject to conditions. The Department adopted the proposed

decision in its entirety on July 11, 2019, and a certificate of decision was issued on July 30, 2019.

Seven individuals who had previously protested the license withdrew their protests after the Department imposed conditions on the license. Appellant is the sole remaining protestant in this matter.

Appellant/protestant thereafter filed a timely appeal contending: (1) the Department did not prove that public convenience and necessity would be served by issuance of the license; (2) there is an over-concentration of type-21 licenses in the area, a school within 600 feet, and residences within 100 feet that should preclude issuance of the license; and (3) CVS Pharmacies at other locations have been cited for selling alcohol to minors.

The issues are closely related, and will be treated as a single issue — i.e., was there substantial evidence in the record to support the Department's determination that a type-21 general license should be issued to the applicants.

DISCUSSION

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, 112 [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, 212 Cal.App.2d at p. 114.*)

In his opening brief, appellant/protestant asserts that the Department's decision is in error and that the Department failed to prove various facts. (AOB at p. 1.) He specifically asks the Board to "reconsider the facts and testimony presented in this case" and states that he will be presenting new evidence to the Board to substantiate his assertions. (*Ibid.*)

Appellant/protestant cites no legal authority for his position that the decision is in error, nor does he reference citations to the record in claiming error. We are presented only with his opinion. To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or support for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing authority. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].)

Furthermore, appellant/protestant made no motion to augment the record nor did he offer any justification for why new evidence, if it exists, could not have been presented at the administrative hearing. This Board does not have the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.) However, in this case there has been no such showing. Accordingly, we must decline to consider anything not already part of the record in this matter.

Finally, to address appellant/protestant's claim that the Department's decision is in error and that it failed to prove various points (AOB at p. 1), we note that 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 Beverage Control Appeals Bd.* (2006) 139 Cal.App.4th 471 [43 Cal.Rptr.3d 420].)

The decision lays out in great detail the evidence supporting the ALJ's recommendation that the license should be issued, subject to conditions, and for the conclusions that: (1) issuance of the license would not be contrary to public welfare and morals, and (2) that the applicant met its burden of proof. There is no need to repeat those findings and conclusions here. We have carefully reviewed the record and find no error.

Disagreement with the findings and conclusions reached by the ALJ constitutes neither error nor an abuse of discretion. The applicant made its case — that the issuance of the license would not be contrary to public welfare and morals — and having failed to rebut that case at the administrative hearing, appellant/protestant would like this Board to reweigh the evidence and reach a different conclusion. Ultimately, appellant/protestant is simply asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.²

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, 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.

APPENDIX

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

IN THE MATTER OF THE PROTEST OF:

BARRY GAUTHIER

AGAINST THE ISSUANCE OF A LICENSE TO:

**GARFIELD BEACH CVS LLC AND
LONGS DRUG STORES CALIFORNIA LLC
CVS PHARMACY 11111
390 NORTH BREA BLVD
BREA, CA 92821-4005**

SANTA ANA DISTRICT OFFICE

File: 21-593175

Reg: 19088441

CERTIFICATE OF DECISION

OFF-SALE GENERAL - LICENSE

**Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on July 11, 2019. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

Sacramento, California

Dated: July 30, 2019

RECEIVED

JUL 31 2019

**Alcoholic Beverage Control
Office of Legal Services**



**Matthew D. Botting
General Counsel**

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

IN THE MATTER OF THE PROTEST OF:

Barry Gauthier

AGAINST THE ISSUANCE OF AN
OFF-SALE GENERAL LICENSE TO:

Garfield Beach CVS LLC, and
Longs Drug Stores California LLC
Dbas: CVS Pharmacy 11111
390 North Brea Boulevard
Brea, California 92821-4005

} File: 21-593175

} Reg.: 19088441

} License Type: 21

} Word Count: 15,011

} Court Reporter:

} Miranda Perez of

} Kennedy Court Reporters

Under the Alcoholic Beverage Control Act

} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on April 30, 2019.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

R. Bruce Evans, Attorney, represented the Applicants, Garfield Beach CVS LLC, and Longs Drug Stores California LLC.

Protestant Barry Gauthier personally appeared and was not represented by counsel. The Protestant was allowed to appear and participate in the hearing as a party pursuant to Government Code section 11500(b).

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on April 30, 2019.

ISSUES

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 it would (1) lead to an over-concentration of licenses in the census tract pursuant to section 23958.4, (2) lead to an over-concentration of alcohol outlets in the area, (3) impact consideration points pursuant to section 23789, specifically Brea Junior High School, (4) interfere with public safety,

with a specific concern that children will frequent the store and attempt to purchase alcoholic beverages, and (5) have an impact regarding allegations that other CVS locations have been cited on many occasions for allegedly selling alcohol to minors.¹

FINDINGS OF FACT

1. The pending application was filed with the Department on April 19, 2018. It seeks issuance of a type 21, off-sale general license for premises located at 390 North Brea Boulevard, Brea, California (the Premises).
2. The Premises is located in a free-standing, newly built one-story building which measures approximately 86 feet by 136 feet, and includes a mezzanine, measured at approximately 20 feet by 94 feet, which serves as storage. The Premises is located in a mixed commercial and residential area, at the intersection of two major thoroughfares, North Brea Boulevard and East Lambert Road. The Premises has parking for its patrons in a shared parking lot. The planned operation of the Premises is that of a variety store and pharmacy with a drive-through window. (Exhibits D3 and D4.) In November of 2018, the Applicant began operating the Premises according to its planned operation.
3. The Premises has never been licensed through the Department of Alcoholic Beverage Control. The Applicant was issued an Interim Operating Permit (IOP) on November 20, 2018, with a second IOP issued on March 21, 2019. Since issuance of the IOPs the Department has received no complaints concerning operation of the Premises under the IOPs and the Premises has not sold alcoholic beverages to minors. The Premises complies with all local zoning requirements.
4. The Premises was required to obtain a Conditional Use Permit (CUP) prior to applying for an alcoholic beverage license. On August 15, 2018, the Department received a letter from the Brea Planning Commission which approved on June 27, 2017, a CUP 17-02 for the Premises to allow for the sale of alcoholic beverages ancillary to the pharmacy. Total alcoholic beverage sales at the Premises are estimated at 5 percent. The Brea Planning Commission further found the sale of alcoholic beverages will not adversely affect the public, health, safety or general welfare, and deferred the determination of public convenience or necessity to the Department of Alcoholic Beverage Control.
5. There are no residences located within 100 feet of the Premises.

¹ At the beginning of the hearing, the undersigned indicated to the parties all issues that would be considered, including that generic and statutory over-concentration pursuant to §23958.4 would be considered during the hearing. None of the parties objected to the issues as stated by the undersigned.

6. There is one consideration point within 600 feet of the Premises, Brea Junior High School, located at 400 North Brea Boulevard, in Brea, which is approximately 180 feet north of the Premises. Separation factors include the Premises parking lot, West Lambert Road, which is a six-lane street, and the Brea Junior High School's parking lot, with no direct view to the Premises. Brea Junior High School is a public school, which serves students from grades seven to eight, with school hours from 8:10 a.m. to 2:55 p.m. On May 2, 2018, the Department Licensing Representative Roxana Zaharia² mailed a certified notification letter, through the U.S. Postal Service, to the Brea Junior High School at 400 North Brea Boulevard in Brea, to advise it of the application, and received no response, as of the date of the hearing. There is no evidence that issuance of the applied-for license would adversely impact the Brea Junior High School or its students.
7. The Premises is located in census tract 15.07. Using the formula set forth in the Alcoholic Beverage Control Act, two off-sale licenses are permitted within this census tract. As of the hearing, three off-sale licenses exist. With the license count currently at three, the issuance of the applied-for license will cause the census tract to become over-concentrated.
8. There is one off-sale general licensed premises within a 1000-foot radius of the Premises, which is 7-Eleven, Inc., a small convenient/liquor market owned by Protestant Barry Gauthier, holding a type 21 off-sale general license at 109 West Lambert Road in Brea, approximately 330 feet northwest of the Premises. (Exhibit D5.)
9. The Department found that public convenience or necessity would be served by issuance of the applied-for license because the Premises is uniquely different from the other licensed operation(s), in that the Applicant is a leading pharmacy retailer in the United States and is located in a conveniently accessible location to accommodate busy families as well as provides a variety of items for one-stop shopping for their customers. The Protestant's 7-Eleven premise is not able to provide the convenience of the variety of items and pharmacy which the Applicant provides to the community within a 1000-foot radius.
10. The Brea Police Department (Brea PD) has jurisdiction over the area where the Premises is located. While at the time of the application for the applied-for license the Brea PD did not provide statistical data within the meaning of Section 23958.4, it does not oppose or object to the issuance of the applied-for license. On April 26, 2018, Sergeant Steve Thompson of the Brea PD reported that there are no issues, concerns or objections regarding issuance of the applied-for license.

² At the time Ms. Zaharia conducted the investigation into the proposed premises' application for alcoholic beverage license (Exhibit D2) she was a Licensing Representative, and currently is a Staff Service Manager for the Santa Ana District Office.

11. Protestant Barry Gauthier appeared and testified at the hearing. He owns the 7-Eleven Inc. type 21 off-sale general licensed premises located 330 feet northwest of the Premises at 109 West Lambert Road in Brea. Protestant Gauthier said that his concerns were the overconcentration of licenses in the area, the nearby consideration point under section 23789 of Brea Junior High School, and his claim that from Orange County to San Diego CVS-type stores have been cited in the past for selling alcoholic beverages to minors. There was insufficient evidence to substantiate relevant CVS licensed premises' sale to minor violations. Protestant Gauthier's general concern was to ensure that due diligence was performed by the Department. Mr. Gauthier took photographs on Friday, April 26, 2019, of the front exterior entrance of the Premises, depicting whom he believed were students from Brea Junior High School waiting for their parents and relatives to pick them up after school. Protestant Gauthier questioned whether these children were loitering in front of the premises. (Exhibit P1 and P2.) The issue of loitering was not brought up in Mr. Gauthier's protest. However, there is no evidence of loitering in front of the Premises, or that the children depicted in Exhibits P1 and P2 were loitering in front of the Premises.

12. Licensing Representative, at the time, Roxana Zaharia, conducted a thorough investigation into the Protestant's raised concerns. (Exhibit D2.) Ms. Zaharia made three visits to the Premises, with her most recent visit on April 18, 2019. The investigation revealed 32 off-sale licenses issued in the city of Brea, with none issued to the Applicant. A research of the CVS locations within the neighboring cities of La Habra, Fullerton, Yorba Linda and Placentia revealed a total of 10 off-sale licenses issued to the Applicant, with no disciplinary history found against those licenses. The Department recommended five conditions be attached to the applied-for license should it issue. The Applicant agreed to the conditions on August 14, 2018. The conditions include that (1) sales and service of alcoholic beverages shall be permitted only between the hours of 8:00 a.m. and 11:00 p.m. each day of the week, (2) there shall be no exterior advertising or sign of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages, (3) the petitioner(s) shall post a prominent, permanent sign stating, "NO LOITERING IS ALLOWED ON OR IN FRONT OF THESE PREMISES" in a place that is clearly visible to patrons of the Licensed Premises. The sign shall be at least two feet square with at least two inch block lettering, (4) no alcoholic beverages shall be consumed on any property adjacent to the Licensed Premises under the control of the licensee(s) as depicted on the most recently certified ABC-257 and ABC-253, (5) the petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control as depicted on the most recently certified ABC-257 and ABC-253. (Exhibit D6.) In the Department's opinion, these conditions should alleviate any adverse impact from issuance of the license. Accordingly, the Department recommended the license issue subject to these conditions.

13. Stephen Weed appeared and testified at the hearing. Mr. Weed has worked for CVS stores for four years. During that time he has been a CVS store manager. Mr. Weed has worked for the Applicant Premises since it opened and is the store manager of the Premises. Mr. Weed is familiar with the CVS training program for responsible sales of alcoholic beverages. When associates are hired they are required to take a written examination to show they understand the alcohol sales store policy and procedure. CVS requires its associates ask for the identification (ID) of anyone appearing under the age of 27, and check the ID to ensure it is valid and matches the customer making the purchase. Preventative measures in place at the Premises include associates preventing loitering in the general vicinity of the Premises, and if any associate suspects someone is intoxicated, or purchasing alcohol for a minor they refuse that sale.

14. Mr. Weed works at the Premises from 6:00 a.m. to 3:00 p.m. During his shifts he has the occasion to have students from Brea Junior High School in the Premises after school is out. The students make purchases in the store and then wait outside for their parents or relatives to pick them up. There have never been any problems with the Brea Junior High Students attempting to purchase alcoholic beverages at the Premises. The Premises has a policy in which they place upon distilled spirits security caps which have a sensor that makes an audible noise if the bottles are brought near the front entrance/exit doors. The associates have a special tool to remove the security caps for age-appropriate customer sales of distilled spirits. Alcoholic bottles which are smaller than 750 milliliters are placed in a locked cage. The sales associates are stationed in close proximity to the alcohol displayed throughout the store and have a good view thereof from the front cash registers. There also is a visual monitor above the distilled spirits aisle. (Exhibit A3 – color photo of interior of Premises, and Exhibit A4 – color photo of distilled spirits aisle.) Mr. Weed testified that he has a good relationship with the kids who enter the store, as they do not walk down the distilled spirit aisle and if they do the sales associates approach them, offering customer service.

15. Mr. Weed was shown the two photographs taken by Protestant Gauthier. Mr. Weed described that the photographs depicted school children waiting in the front exterior of the Premises to be picked-up after school, most of whom are regular customers to the Premises. (Exhibits P1 and P2³.) Mr. Weed testified that the picture depicts a regular occurrence, such that after the children are let out of school for the day, the students from Brea Junior High School enter the premises, make purchases and thereafter get picked-up by their parents, who arrive in vehicles in the Premises' shared parking lot. When the Premises first opened, Mr. Weed and the Applicant held a meeting with the principal of Brea Junior High School and voiced their concern to the principal about the number of

³ Exhibit P2 depicts approximately five children either sitting or standing against the front wall of the exterior premises, one child walking toward a skateboard, and approximately four other children either walking past or out of the Premises' front doors. Exhibit P2 is a close-up shot of Exhibit P2.

children being picked-up in front of the Premises, because there were significantly more children congregating at that time. The principal of the school made an announcement to the parents of the school children and the congestion reduced significantly. Mr. Weed does not consider these said children as depicted in Exhibits P1 and P2 to be a problem, but in fact he finds they help the Premises with its sales. Furthermore, from Mr. Weed's understanding, it also helps the children's parents because there are parking congestion problems occurring directly across the street at the school, so the Premises helps the community as far as being a safe place for them to pick-up their children. Mr. Weed has gotten to know some of the school children, whom he finds do not steal and are not a problem. Mr. Weed testified that the "NO LOITERING" sign is located at the front entrance window.

16. Anna Lambropoulos appeared and testified at the hearing. Ms. Lambropoulos is a land-use specialist at the law firm of Solomon, Saltsman and Jamieson. She has a Bachelor's degree and is pursuing a graduate degree while attending classes at UCLA, including a class in cartography and geographic information systems. Ms. Lambropoulos prepared two maps, based on her experience and training, which depict "Off-Site ABC Licenses within 1000 Foot Radius of CVS#11111" (Exhibit A1) and "Off-Site ABC Licenses within ½ mile Radius of CVS#11111" (Exhibit A2). Ms. Lambropoulos confirmed there to be one off-sale licensed premises within 1000-foot radius of the Premises, the 7-Eleven located at 109 West Lambert Road in Brea. She further determined there to be three off-sale licensed premises within one-half mile radius of the Premises, specifically, the 7-Eleven located at 109 West Lambert Road in Brea, Joe's Liquor at 710 North Brea Boulevard in Brea, and Vons located at 780 North Brea Boulevard in Brea.

17. Except as set forth in this decision, all other allegations in the protests and all other contentions of the parties lack merit.

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. Business and Professions Code section 23958⁴ requires the Department conduct a thorough investigation to determine, among other things, if the Applicant and the 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

⁴ All statutory references are to the Business and Professions Code unless otherwise noted.

deny an application for a license if the Applicant or the Premises do not qualify for a license under the Act.

3. In a protest matter, the Applicant bears the burden of establishing it is entitled to a liquor license from the start of the application process until the Department makes a final determination.⁵

4. In cases involving an application for an original license or the premises-to-premises transfer of a retail license, rule 61.4⁶ provides that no such license shall be issued if the premises or its parking lot is located within 100 feet of a residence. An exception to this prohibition exists if the applicant establishes that the operation of the business would not interfere with such residents' quiet enjoyment of their property.

5. There are no residences located within 100 feet of the Premises. As such, Rule 61.4 does not apply. (Findings of Fact ¶ 5.)

6. Section 23789 provides that the Department is specifically authorized to refuse to issue any retail license for premises located (a) within the immediate vicinity of churches and hospitals or (b) within 600 feet of schools and public playgrounds or non-profit youth facilities. In the present case, there is one consideration point, the Brea Junior High School. The Department mailed a certified notification letter to the said school but received no response. There is no evidence that issuance of the applied-for license would adversely impact the school or its students. (Findings of Fact ¶ 6.)

7. A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail. (Evidence Code section 641.)

8. The Protestant proffered the idea that it might have been possible the Brea Junior High School did not receive the Department's certified notification letter mailed to it on May 2, 2018. The Protestant provided no reasonable explanation as to why the letter would not have been received by the Brea Junior High School, other than the assumption and speculation on his part. Ms. Zaharia credibly testified that the said letter was properly mailed to the Brea Junior High School's address. The Protestant failed to rebut the presumption that the said letter was received by the Brea Junior High School. Therefore, it is found the Department's certified notification letter dated May 2, 2018, was received by the Brea Junior High School in the ordinary course of mail.

⁵ *Coffin v. Alcoholic Beverage Control Appeals Board*, 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420, (2006).

⁶ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

9. 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.

10. With respect to the first prong, section 23958.4 provides that a reporting district is high crime (and, therefore, over-concentrated) if it has a 20 percent greater number of reported crimes, as defined, than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency. In the present case, based on the evidence presented, the Brea PD did not generate statistical data within the meaning of Section 23958.4. It did, however notify the Department that the Brea PD did not oppose or object to the issuance of the applied-for license. On April 26, 2018, Sergeant Steve Thompson of the Brea PD reported there to be no issues, concerns or objections regarding issuance of the applied-for license. As such, the area in which the Premises is located is not over-concentrated based on crime. (Findings of Fact ¶ 10.)

11. The second prong of section 23958.4 provides that, with respect to off-sale retail licenses, a census tract is over-concentrated if the ratio of off-sale retail licenses to population in the census tract in which the applied-for premises is located exceeds the ratio of off-sale retail licenses to population in the county in which the applied-for premises is located. The Premises is located in census tract 15.07. Two off-sale licenses are permitted in this census tract, and three currently exist. The applied-for license would be the fourth off-sale license in the census tract if approved. Accordingly, the area in which the Premises is located will have an over-concentration of licenses based on license count if the applied-for license were issued. (Findings of Fact ¶ 7.)

12. Since the area in which the Premises is located has an over-concentration of licenses, a determination of public convenience or necessity is necessary before a license may issue. The Department determined public convenience or necessity was met based on the unique nature of the Applicant's operation, specifically that the Applicant is a leading pharmacy retailer in the United States and is located in a conveniently accessible location to accommodate busy families as well as provides a variety of items for one-stop shopping for their customers. There are no other licensed premises that offer the same services as the Premises, including those within a 1000-foot radius of the Premises, which meets the needs of the community that they would not otherwise experience anywhere else. Under these circumstances, public convenience or necessity exists. (Findings of Fact ¶ 9.)

13. 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, while legally separate, are factually intertwined.

14. There is one off-sale licensed premises within a 1000-foot radius of the Premises. Given the mixed residential and commercial area this does not appear to be excessive. Nonetheless, the Premises is uniquely different from the one off-sale license, 7-Eleven, Inc., as described above. (Findings of Fact ¶ 9.)

15. In addressing Protestant's concerns the Department Licensing Representative conducted a thorough investigation, including making multiple visits to the Premises. (Exhibit D2.); meeting Protestant's general concern that due diligence was performed by the Department. There is no evidence that issuance of the applied-for license would adversely impact the only consideration point in existence, the Brea Junior High School or its students. The Brea PD found had no objections, issues or concerns with issuance of the applied-for license. In addition, the Applicant has been operating under the IOP since November 20, 2018, with no evidence of complaints associated with the Premises or relating to the type 21 license on the Premises. The operator and principal of the Premises has no disciplinary history connected with any of its licensed premises. The Brea Planning Commission found the sale of alcoholic beverages will not adversely affect the public, health, safety or general welfare. Mr. Weed credibly testified there have never been any problems with the Brea Junior High Students attempting to purchase alcoholic beverages at the Premises. The Department found there to be public convenience or necessity was met due to the Premises unique operation compared with other off-sale premises within 1000-foot radius. Based upon the preponderance of the evidence, issuance of the license with the conditions listed in the Petition for Conditional License will mitigate any of the Protestant's concerns. (Findings of Fact ¶¶ 3 through 16.)

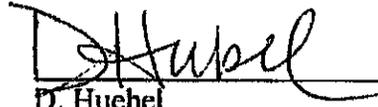
16. The Applicant has made specific efforts to ensure the Premises is a good neighbor. These efforts include, but are not limited to, making contact and meeting with the Brea Junior High School principal. The Applicant ensures its sales associates receive extensive training in sales of alcoholic beverages to make sure only persons 21 years and older are sold alcoholic beverages. The Applicant has further taken steps to ensure that all alcohol is closely monitored from close proximity, that distilled spirits have sensor-secured caps, and bottles smaller than 750 milliliters are placed in a locked cage. The Applicant has committed to a principle that its operation is uniquely different from all other nearby licensed premises and that it exceeds the needs of the community and patrons. All of these efforts will mitigate the Protestant's concerns. (Findings of Fact ¶¶ 13 through 15.)

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ORDER

The protest of Barry Gauthier is overruled. The type 21 off-sale general license shall issue to Garfield Beach CVS LLC, and Longs Drug Stores California LLC, subject to the conditions set forth in the Petition for Conditional License.

Dated: May 23, 2019


D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob * Appelquist</u>
Date: <u>7/11/19</u>