ISSUED MARCH 5, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHONG SOO CHOI Appellant/Protestant, v. HAMID A. FARSAI and MAHNAZ MEHROUZ 6002 Bolsa Avenue Huntington Beach, CA 92647 Respondents/Applicants, and THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6505 File: 20-290342 Reg: 94007415 Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes Date and Place of the Appeals Board Hearing: January 11, 1996 Los Angeles, CA

Chong Soo Choi (appellant), appealed from a decision of the Department of Alcoholic Beverage Control[1] which overruled the protests filed against the issuance of an off-sale beer and wine license to Hamid A. Farsai and Mahnaz Mehrouz (applicants), who proposed to operate an Arco AM/PM convenience store at the current site where applicants operated an Arco gasoline station, on the grounds that the protestants in the

[1]The department's decision dated January 12, 1995 is set forth in the appendix.

proceedings before the department did not prove that issuance of the license would create conditions contrary to the public welfare and morals provisions of the California Constitution, Article XX, Section 22, and Business and Professions Code §23958.

Appearances on appeal included Dale M. Fiola, counsel for appellant; Rick A. Blake, counsel for applicants; and Jonathon E. Logan, counsel for the department.

FACTS AND PROCEDURAL HISTORY

Applicants operated an Arco gasoline station and applied to the department for a license to be placed in their proposed Arco AM/PM convenience store.

Protests were filed with the department against the issuance of the license. Thereafter, an administrative hearing was held on December 14, 1994, wherein oral and documentary evidence was admitted. The issues considered at that proceeding were (1) proximity to residents and potential for disruption of neighborhood quiet enjoyment, (2) creation or aggravation of a law enforcement problem due to increased crime, (3) creation of an undue concentration of licenses in the area, and (4) traffic and parking problems for area residents.

The department subsequently issued its decision overruling the protests and essentially allowing the license to be issued. Chong Soo Choi, one of the protestants, then filed a timely notice of appeal.

In his appeal, appellant raised the following issues: (1) issuance would create an undue concentration of licenses, (2) issuance would interfere with residential quiet enjoyment, and (3) there is newly-discovered evidence which the department should consider.

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DISCUSSION

There appears to be some misconception as to the powers and duties of the appeals board and the department. It is the department which is authorized by the California Constitution to exercise its discretion whether to deny or issue an alcoholic beverage license, if the department shall reasonably determine for "good cause" that the denial or the granting of such license would be in accordance with the public welfare and morals.

The scope of the appeals board's review, on the other hand, is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals board may not exercise its independent judgment[2] on the effect or weight of the evidence, but is authorized to determine whether the findings of fact made by the department are supported by substantial evidence in light of the whole record, and whether the department's decision is supported by the findings. The appeals board is also authorized to determine whether the department has proceeded in the manner required by law, or proceeded in excess of its jurisdiction (or without jurisdiction).[3]

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[2]However, we do agree with protestant that the board has independent judgment as to questions of law (Pacific Legal Foundation v. Unemployment Insurance Appeals Board (1981) 29 Cal.3d 101, 109, 172 Cal.Rptr. 194; American Federation of Labor v. California Unemployment Insurance Appeals Board (1994) 23 Cal.App.4th 51, 28 Cal.Rptr.2d 210).

[3]The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion (Universal Camera Corporation v. National Labor Relations Board (1950) 340 U.S. 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647).

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925).

Review by the appeals board does not "...resolve conflict[s] in the evidence, or between inferences reasonably deducible from the evidence..." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678, 13 Cal.Rptr. 658).

The appeals board is bound to resolve these conflicts of evidence in favor of the department's decision, and must accept all reasonable inferences which support the department's findings (Gore v. Harris (1964) 29 Cal.App.2d 821, 40 Cal.Rptr. 666). See Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 67 Cal.Rptr. 734, 737; Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439, 102 Cal.Rptr. 857--a case where there was substantial evidence supporting the department's as well as the license-applicant's position; and Kruse v. Bank of America (1988) 202 Cal.App.3d 38, 248 Cal.Rptr. 271.

I

Appellant contended that issuance of the license would create an undue concentration of licenses.

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The department's finding 9a stated that California Code of Regulations, Title 4, §61.3 (rule 61.3) did not apply, and finding 9b stated that there was no undue concentration of licenses. Exhibit 2 is a map of the area surrounding the premises. It shows that there is one other similar type license, located approximately 317 feet north of the premises. There are three other on-sale type licenses surrounding the competitor's license. "Undue concentration" of licenses is prohibited by Business and Professions Code §23958,[4] but the statute does not define the term. Rule 61.3 defines the term, but such definition is arrived at by the combined use of population and crime statistics, factors not applicable in the present matter, as noted by the administrative law judge (ALJ) in finding 9a.

Prior to the passage of rule 61.3, the department experienced difficulty in determining when undue concentration of licenses existed. Since the passage of the rule, applicable cases have found undue concentration to have existed. The appeals board has considered many cases on undue concentration.[5] Appellant has not provided any authorities which define "undue concentration" nor has he demonstrated that such

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[4]All further references to code sections will be to the Business and Professions Code unless otherwise indicated.

[5]See Zawaideh v. Planck (1994) AB-6425, which contains a discussion of rule 61.3 and other methods of showing undue concentration; Shamas v. Buzbee (1994) AB-6359; and Main Street Plaza v. Roth (1993) AB-6352.

applies in the present matter.

We determine that undue concentration of licenses was not shown.

II

Appellant contended that issuance of the license would interfere with residential quiet enjoyment.

Finding 10c stated that California Code of Regulations, Title 4, §61.4 (rule 61.4) did not apply, and issuance of the license would not interfere with nearby residents as found in finding 11. Appellant failed to understand that the applicability of rule 61.4 is statutory and the precise terms of it must be adhered to by the department and by any of the parties to a proceeding. Any finding by the administrative law judge (ALJ) that rule 61.4 was applicable, without substantial evidence supporting the elements of the rule, would have been prejudicial error.

Again protestant is in error as to the law as it applies to finding 11; that is, the burden is on the protestants to prove by substantial evidence that the issuance of the license would interfere with their quiet enjoyment, which the ALJ found was not proven. Protestants testified at the hearing regarding their concerns [R.T. 33, 50, 56, 63, 68, 73, 74]. Much of the testimony expressed legitimate concerns as to the implications that issuance of the license might bring to the residential area. Concerns about litter [R.T. 38, 53], traffic [R.T. 35-36], crime [R.T. 40, 51, 69], and loitering, especially in the nearby canal [R.T. 40, 52, 56-57], appeared to be paramount. These concerns, which were given by direct testimony, constituted substantial evidence.

However, substantial evidence was also produced as to the validity of the

issuance of the license, in that exhibit 3 sets forth the proviso that issuance without certain conditions imposed by the department on the license would be contrary to public welfare and morals. The department imposed ten conditions on the license. The department apparently determined that the ten conditions would alleviate any detrimental impact to area residents. The court in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App.2d 489, 30 Cal.Rptr. 219, 222, enumerated several factors the department may consider in determining if a license would endanger welfare or morals:

> "...the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protest made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433, 441, 102 Cal.Rptr. 857, the Supreme Court said "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the opinions of experts." Although the case was not a rule 61.4 matter (the closest residence was about 150 feet away), the Kirby/Schaeffer court upheld the department's determination that issuance of the license sought therein would, inter alia, interfere with nearby residential quiet enjoyment even though no nearby resident had voiced opposition to the license. The court took note of substantial evidence on both sides of the issue and

concluded that the expert witness testimony of the county sheriff was sufficient to support the department's crucial findings.

We therefore conclude that the findings concerning non-interference were supported by substantial evidence.

III

Appellant contended that there is newly-discovered evidence which the department should consider.

The motion that there is newly-discovered evidence must be set forth in accordance with rule 198. Appellant has not conformed to the rule. While great liberality is usually granted to all parties by the board if the technical requirements of procedure are not followed, there must be demonstrated the relevancy of the evidence and that the evidence was not reasonably available at the time of the administrative hearing.

The statistics appear to have been available at the time of the administrative hearing, and, appellant has not shown the relevancy of these statistics which the board determines are of very limited relevancy.

CONCLUSION

The decision of the department is affirmed.[6]

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[6]This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

RAY T. BLAIR, JR.,CHAIRMAN
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

DISSENT FOLLOWS

Dissent of John B. Tsu

I respectfully dissent. I feel my esteemed board members failed to adequately consider the voice of the community as shown by the large number of protestants who filed protests in opposition to the issuance of the license and who in the main, reside within the immediate area and would be most affected by the issuance of the license. I would not allow the license to issue and would sustain the protests.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD