ISSUED NOVEMBER 15, 1996

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GREENWATER INVESTMENTS, INC. dba La Jolla Brewing Co. 7536 Fay Avenue La Jolla, CA 92037, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6585 File: 23-248755 Reg: 95-033222 Administrative Law Judge at the Department Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: May 1, 1996 Los Angeles, CA

Greenwater Investments, Inc., doing business as La Jolla Brewing Co. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied appellant's petition to modify its conditional small beer manufacturer's license to allow appellant's entertainers to perform with amplification through the existing stereo system, by authority of Business and Professions Code §23803.

Appearances on appeal include appellant Greenwater Investments, Inc., appearing through its counsel, Michael H. Riney; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department dated October 5, 1995, is set forth in the appendix.

Appellant's license was issued on October 5, 1990, subject to six conditions, one of which apparently limited live entertainment "to three entertainers without amplification" [App. Opening Brief 3]. In January 1995, appellant filed a petition to modify the conditional license. This petition included the same restriction on live entertainment, but allowed one pool table in the premises. The license was apparently modified in accordance with this petition on March 1, 1995. On April 7, 1995, appellant filed a petition to modify its conditional license to allow its entertainers to perform with amplification through appellant's existing in-house stereo system.[2]

An administrative hearing was held on September 8, 1995, at which time oral and documentary evidence was received. After that hearing, the Administrative Law Judge (ALJ) issued his proposed decision in which it was determined that appellant had failed to prove by a preponderance of the evidence that the grounds which caused imposition of the conditions on the license no longer existed. It was also determined that "[r]emoval of the condition from the license would be contrary to public welfare and morals."

Subsequent to the hearing, the Department issued its decision adopting the proposed decision of the ALJ and denying appellant's "petition for removal of a condition."

In its appeal, appellant raises the issues that the crucial finding that appellant did not establish that the circumstances had changed since issuance of the conditional

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[2] An earlier petition that included a request to "Allow the three entertainers to perform with amplification" [R.T. Exhibit F] was denied on October 22, 1992, after an administrative hearing.

license is not supported by substantial evidence and that the determination that removal of the condition from the license would be contrary to public welfare and morals was not supported by the findings.

DISCUSSION

I

Appellant contends that the crucial finding regarding failure to show changed circumstances was not supported by substantial evidence.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or the weight of the evidence, but is authorized to determine whether the Department's decision is supported by the findings. The Department's decision may not be disturbed unless it lacks substantial support on its face. (See American Federation of Labor v. Unemployment Ins. Appeals Bd. (1994) 23 Cal.App.4th 51, 58 [29 Cal.Rptr.2d 210]; Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 21 Cal.3d 101, 111 [172 Cal.Rptr. 194]).

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].) "Substantial evidence" is defined as relevant evidence which reasonable minds would accept as a rational support for a

conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The authority of the Department to impose reasonable conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800, subdivision (a), is that "...if grounds exist for the denial of an application...and if the Department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the Department may grant the license subject to those conditions. Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...." We therefore view the word "reasonable" as set forth in §23800 to mean that there must be a nexus, defined as a "connection, tie, link,"[3] in other words, a reasonable connection, between the problem sought to be eliminated and the condition designed to eliminate the problem.

Business and Professions Code §23803 provides, in relevant part: "The Department, upon its own motion or upon the petition of a licensee . . . , if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal."[4]

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[3]See Webster's Third New International Dictionary, 1986, page 1524.

[4]The next sentence of the statute refers to "Any petition for removal or modification of a condition pursuant to this section . . . ." Therefore, it appears that the requirements for modification of a condition are essentially the same as those for removal.

In this case, the licensee petitioned the Department for modification of one condition on its license. The condition sought to be modified was: "Live entertainment shall be limited to three entertainers performing without amplification and no later than 12:00 midnight." The licensee sought to have that condition modified to read as follows: "Live entertainment shall be limited to three musicians or less. Acoustical instruments and musicians' voices can be amplified through the house stereo system. Live entertainment shall be no later than 12:00 midnight."

A necessary prerequisite to the Department being "satisfied that the grounds which caused the imposition of the conditions no longer exist" is the determination of what those grounds were. In this case, although the original conditional license was not included in the record, a decision of the Department on an earlier petition to modify conditions stated: "The conditions were originally imposed on the license because the San Diego Police Department (SDPD) protested the issuance of the license to petitioner on the grounds that issuance of the license would aggravate an existing police problem because of the crime rate in the reporting district in which the premises are located. The protest of the SDPD was withdrawn when petitioner executed the petition, dated July 20, 1990 . . . ."[5]

The crime statistics upon which the Department based its decision in that prior matter are found in Findings of Fact IV of Exhibit F: "The premises are located in San Diego Police Department (SDPD) reporting district number 82. When the

[5]This decision of the Department was dated October 22, 1992, and denied a request for modification to allow unrestricted amplification of music on the licensed premises. This decision was submitted as Exhibit F at the administrative hearing.

license was issued, the district had 134.6 percent greater number of reported crimes than the average number of reported crimes in all reporting districts within the City of San Diego. On April 1, 1992, reporting district number 82 had 143.6 percent greater number of reported crimes than the average number of reported crimes in all crime reporting districts within the city of San Diego. . . ." Therefore, the only indication in the record for imposing the original condition is "the crime rate in the reporting district [district 82]."

Appellant presented evidence of a change in crime statistics, an issue that the Department never addressed except to point out that the statistics did not show which were alcohol-related crimes. The only evidence in the record relating to crime statistics shows that the crime rate in the area has dropped to a level below that which existed when appellant obtained its license. The Department has presented no evidence that we can find in the record that the "crime rate in the reporting district" is still a problem.

The Department presented testimony and argument about (but presented no documentary evidence of) a violation of the liquor laws by appellant; Rule 61.3 (Cal.Code Regs., tit. 4, §61.3), which, by the Department's own admission, was never applied to the appellant's application and so cannot be used as grounds for the original condition; Rule 61.4 (Cal.Code Regs., tit. 4, §61.4),[6] another rule never mentioned before in connection with appellant's license; and vague and unsubstantiated allegations that appellant was somehow doing something not

[6]The text of §§61.3 and 61.4 is set out in the appendix.

allowed by its license. The relevance of these issues in this matter was never explained by the Department.

All that we can find in the record that the Department presented to show that the circumstances that prompted the conditions still existed was testimony by a San Diego Police Department officer and the closing argument made by counsel for the Department. The officer was asked by counsel for the Department "whether or not anything is changed in the surrounding area since the time of your investigation that was first licensed to -- the date of the request for modification?" and the officer answered "As far as I know, nothing has changed" [R.T. 105]. Counsel for the Department, in his closing argument to the ALJ, stated: "Your Honor, it's the [appellant's] burden in this case to prove change to circumstance, but what we're talking about is change from what?" [R.T. 119]. He then said: "We are talking about changed circumstances. We're talking about changes in the characteristics of the community that would be affected by the lifting of the condition. . . . It was residential back then. It's still residential." [R.T. 119-120].

The primary problem with both of these statements is that neither of them address in any way the circumstances that originally caused the imposition of the condition. Simply saying that "nothing has changed," besides being mere opinion, does not sufficiently pinpoint what it is that the Department contends has not changed. And stating that the community was residential and is still residential doesn't address the issue of "aggravating a law enforcement problem."

If the condition was originally imposed because of concern about aggravating a police problem, and that police problem was expressed in terms of certain crime statistics, then what the licensee must show is that those crime statistics have changed. This it has done. Therefore, we must conclude that the finding that appellant had not carried its burden of showing changed circumstances was not supported by substantial evidence.

II

Appellant contends that the ALJ's conclusion that removal of the condition would be contrary to public welfare and morals was not supported by the findings.

The case of Boreta Enterprises, Inc. v. Department Of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 113] defined the term "public welfare" as follows:

> "...It seems apparent the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interests in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable . . . ."

We fail to see how in any way the effects of modifying the condition to allow amplification of acoustical instruments and voices over the existing stereo system have been "canvassed, considered and evaluated as being harmful or undesirable..." In the first place, the appellant has not asked that the condition be removed, but modified. Secondly, the modification is one that has been designed

to have no practical effect discernable to the community, since there could not be a greater volume of noise with the modification. Thirdly, the Department has not shown, or even hinted, how the modification of this condition could have any effect on public welfare and morals. More is required of the Department than just saying it is so. (See Boreta Enterprises, Inc., supra.)

In actual effect, the modification asked for would not change anything. There was no condition that prohibited recorded music to be played over the existing stereo system; it cannot be reasonable to prohibit the playing of live music over that same system. The Department and the ALJ, however, have fixed on the word "amplification" and have ignored the rest of the modification proposed by appellant. The conclusion made by the Department here offends logic and reason, is totally unsupported by the findings, and exceeds even the broad discretion accorded the Department in these matters. We must conclude that the Department has acted unreasonably and arbitrarily in denying appellant's petition for modification of its license.

CONCLUSION

The decision of the Department is reversed and remanded for reconsideration of the petition for modification of the condition.[7]

RAY T. BLAIR, JR., CHAIRMAN

[7]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.

JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD