

ISSUED MARCH 6, 1997

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

JORGE RAMOS LOPEZ and TERESA	)	AB-6610
RAMOS	)	
dba El Cabrito Tapatio	)	File: 41-193956
13110 Van Nuys Blvd.	)	Reg: 95033710
Pacoima, CA 91331,	)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 7, 1996
_____	)	Los Angeles, CA
_____	)	

Jorge Ramos Lopez and Teresa Ramos, doing business as El Cabrito Tapatio (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which denied appellants' petition to modify conditions on their on-sale beer and wine public eating place license. The Department concluded that appellants failed to sustain their burden to show that the reasons for the imposition of the conditions had changed. Modification of the conditions would thereby be contrary to the universal and generic

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<sup>1</sup>The decision of the Department dated November 22, 1995, is set forth in the appendix.

public welfare and morals provisions of the California Constitution, article XX, §22, arising from Business and Professions Code §23800. The request was denied pursuant to §23803<sup>2</sup>

Appearances on appeal include appellants Jorge Ramos Lopez and Teresa Ramos, appearing through their counsel, Louis R. Mittelstadt; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on or about October 1986. The restaurant was small at the time, according to the diagram of the premises submitted to the Department on October 17, 1986 [Exhibit 5]. Also included in Exhibit 5 is what appears to be a completed portion of the Department's application form, which sets forth information about the premises and operational plans of the then applicants, now appellants. The form shows that the operation was to be a small restaurant for 44 guests, with breakfast from 8 a.m. and lunch from 11 a.m. to 6 p.m. There were apparently no plans at that time to remain open for dinner.

Appellants' Petition For Conditional License imposed ten conditions on their license. The reason for the conditions was stated in the petition: there were four residences within 100 feet of the premises.

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<sup>2</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

Thereafter, appellants filed an application to modify conditions 1 and 6<sup>3</sup> (the application referred to conditions 1 and 2, but it is clear that appellants meant to refer to conditions 1 and 6). A Notice of Hearing on Petition to Modify Condition(s) on the License was sent to all parties.<sup>4</sup>

An administrative hearing was held on October 27, 1995, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which denied the request to modify the conditions. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants essentially raise the issue that circumstances had changed and the modification should have been allowed.

#### DISCUSSION

The Administrative Law Judge's (ALJ) decision recited the existing conditions and the reasons for them: there were four residences located within 100 feet of appellants' premises or parking lot, and issuance of a license without the conditions would interfere with the quiet enjoyment of the property of those residents, thus constituting

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<sup>3</sup>Condition 1 states: "Sales, service and/or consumption of alcoholic beverages shall be permitted only between the hours of 8 am and 6 pm each day of the week."

Condition 6 states: "There shall be no live entertainment, amplified music, or patron dancing permitted on the premises at any time."

<sup>4</sup>The application requested that hours of service of alcoholic beverages be extended for Friday through Sunday, from the present 6 p.m. to 10 p.m., and that live entertainment be allowed until 10 p.m.

grounds for denial of a license without any such conditions (Findings of Fact I and II). The ALJ further found that appellants presented credible evidence that they were responsible business persons who worked hard to provide good food to the customers of their restaurant, and there had been no law enforcement problems at the restaurant in the past ten years (Finding of Fact IV). In addition, the ALJ found that appellants purchased the property next door to their restaurant and have expanded the restaurant to include that property (Finding of Fact V). Finally, he found that there were now five residences within 100 feet of appellant's restaurant (Finding of Fact VI).

Appellant's original license application specified that meals were being offered between 8 a.m. and 6 p.m. It appears that at some time thereafter, appellants began serving meals later than 6 p.m. Now, they wish to expand their hours of operation until 10 p.m. on the three weekend nights, for the primary purpose of serving dinner time meals with beverages.

Business and Professions Code §23803 provides that the Department, "if it is satisfied" that the grounds which caused the imposition of the conditions no longer exist, "shall order their removal." This unusual juxtaposition of discretion and obligation means, in our view, that the Department's measure of satisfaction must be a reasonable one and not arbitrary.

Appellants operated their restaurant, and sold alcoholic beverages to their customers, for ten years with no law enforcement problems. They have now physically

expanded it to twice its size [RT 13-14]. Their customers see appellants as offering a "safe family environment" [RT 9] as a family restaurant [RT 26-27].

The Department took the view at the hearing that the expansion of the restaurant was irrelevant, and the ALJ sustained the objection to such evidence. [RT 25-26]. In his proposed decision, however, the ALJ made a finding that appellants expanded their property to include the property next door, and a Determination that appellants' efforts to be a positive element in their community were commendable.

A. Condition 1 concerns the hours of service and consumption of alcoholic beverages. The conditional license lists the reason for the imposition of the original conditions that there were four residences within 100 feet of the premises, and that California Code of Regulations, Title IV, §61.4 (then called the California Administrative Code), applied due to the nearness of the residences. Apparently, section 61.4 (rule 61.4) is based on an implied presumption that a retail alcoholic operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment. The United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471 [100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440, 49 L.Ed.2d 310],

and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

We view, however, the basis for the duty of the Department to refuse the grant of a license or the removal of a condition imposed due to the close proximity of residences is not merely the fact of nearby residents, but the presence of a reasonable potential for disturbance that such an operation may pose to those residents. Thus, the discretion of the Department must be based upon a fair consideration of the facts as to such a potential, and if thus predicated, is well within the Department's constitutionally granted duty to protect those residents for the public good.

Notwithstanding, this Board concludes the discretion exercised by the Department appears arbitrary based on the peculiar facts of this case. The license's application-related-documents show that the common and usual dinner hour from 5 p.m. to 8 to 9 p.m. was not considered by appellants who chose a less conventional closing, listing lunch from 11 a.m. to 6 p.m. It is reasonable to infer that the condition limit of 6 p.m. was more closely linked to the ending of the late lunch period, than to a consideration to protect nearby residents during the period of the usual and normal dinner hour. The Department's foundation for its conclusion that post 6 p.m. (the usual dinner hour period) sales and consumption of alcoholic beverages could adversely impact the nearby residents, is eroded by its allowance of such sales and consumption from 8 a.m. to 6 p.m. The failure of reasonable logic and fairness is the failure to

consider on the record what, if any, impact the sales and consumption during that usual and normal dinner hour (for clients of appellants and most likely residents of the nearby properties) would have on the public welfare and morals.

Clutching at the technical wording of section 23903's wording that "...grounds which caused the imposition of the conditions no longer exist..." is diametrically opposed to the Legislative gift of "discretion." We conclude that a clear view of the problem was clouded by the technical application of an otherwise coherent rule.

We determine that the decision of the Department is apparently arbitrary, necessitating a reversal of the decision and a remanding for such proceedings for the taking of additional evidence if deemed necessary, to determine a reasonable cessation time for the sales and consumption of alcoholic beverages, such cessation being a time which reasonably would not detrimentally impact nearby residents.

B. Condition 6 concerns the presentation of live entertainment, amplified music, or dancing. The noise and attendant conduct of clientele which is foreseeable with live entertainment, music, and dancing is in our view, the very essence of the problem that the rule and the Department seek to avoid. Here the discretion by the Department has been properly and "foundationally" logically proven to be reasonable.

CONCLUSION

The Decision of the Department concerning condition 1 is reversed and remanded for further proceedings in accordance with views expressed in this decision, but as to condition 6, affirmed.

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