ISSUED MARCH 5, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| BETTY D. WICHMAN and<br>RICHARD A. WICHMAN<br>dba Old Magalia Inn<br>13709 Old Skyway<br>Magalia, CA 95954,<br>Appellants/Licensees,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC<br>BEVERAGE CONTROL,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | AB-6637<br><br>File: 47-270377<br>Reg: 95033822<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Michael B. Dorais<br><br>Date and Place of the<br>Appeals Board Hearing:<br>December 4, 1996<br>Sacramento, CA |

Betty D. Wichman and Richard A. Wichman, doing business as Old Magalia Inn (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their on-sale general public eating place license for 15 days, with ten days stayed for a probationary period of one year, for appellants allowing audible sounds of music to emanate from the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of a condition on the license as provided for in Business and Professions Code §23804.

[1]The decision of the Department dated February 8, 1996, is set forth in the appendix.

Appearances on appeal include appellants Betty D. Wichman and Richard A. Wichman, appearing through their counsel, Joseph M. Earley III; and the Department of Alcoholic Beverage Control, through its counsel, John R. Peirce.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on April 23, 1993, subject to certain conditions, including a condition which specified that entertainment provided should not be audible beyond the area under the control of the licensees. Thereafter, the Department instituted an accusation against appellants' license on August 23, 1995, alleging a violation of the condition.

An administrative hearing was held on January 17, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented that appellants had violated condition 2 on their license by allowing music to generate from the licensed premises which was audible to two Department investigators sitting in a parked vehicle between 100 and 150 feet from the premises. The weather at the time of the violation was cold and the doors to the premises were closed, but the music was loud enough for the investigators, who were sitting in their vehicle with the windows closed, to hear the song lyrics and identify the songs being played by the band.

Subsequent to the hearing, the Department issued its decision which suspended appellants' license for 15 days, with ten days stayed for a probationary period of one year. Appellants filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the condition imposed must be reasonable, arguing that the condition was ambiguous; (2) suspension was

unlawful unless there was a finding that the violation was contrary to public welfare and morals; and (3) appellants did not permit the violation.

DISCUSSION

I

Appellants contend that the condition imposed must be reasonable,[2] arguing that the condition was ambiguous. The condition under review states: "Entertainment provided shall not be audible beyond the area under the control of licensees."[3]

Mike Brister, a Department investigator, testified that on April 21, 1995, at approximately 9:50 p.m., while sitting in his auto parked approximately 150 feet from the premises and beyond the area under the control of appellants, he was able to hear a live band playing within the premises. He could hear the musical instruments, and identify the songs being played. He also could discern the lyrics sung to the music. He observed the windows and doors of the premises to be closed, except when someone exited. When the doors opened, the music was louder [RT 11-14, 17]. Thomas

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[2] If the argument of appellants means that the original imposition of the conditions was unreasonable, appellants are too late to raise that defense, as the time to appeal the imposition of the conditions has long since past.

The Appeals Board has consistently held that conditions imposed must be reasonably related to a problem sought to be solved by the imposition of the condition. The Petition for Conditional License which appellants signed noted the close proximity (within 100 feet of the premises) of residences. Such is the problem, and the solution was the conditions, to which appellants apparently consented.

[3]The term "audible" is defined as: "to hear...to perceive...capable of being heard...." The term "entertainment is defined as: "the act of diverting, amusing, or to cause someone's time to pass agreeably...." (Wester's Third New International Dictionary, pages 142 and 757, respectively).

Gilprin, a Department investigator, testified that when he returned to the Department's vehicle from previously having entering the premises, he could hear the band playing and he could hear the lyrics while in the vehicle. The vehicle's windows were placed up and then down while the investigators were listening to the music [RT 34-37, 44].

The arguments of appellants as to the arbitrariness of the conditions are unpersuasive. The condition clearly states the noise restriction. While penalizing noise heard a few feet from the premises could be arbitrary, music and lyrics heard from 100 to 150 feet from the premises is a clear violation of the condition.

The Petition for Conditional License signed by appellants on March 9, 1993, states that the conditions were imposed due to three residents being within 100 feet of the premises [exhibit 2]. The protection of the quiet enjoyment of a resident is of high priority. The Board has often quoted the cases which have set the definite priority concerns of protection to residents. 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].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440], and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

We are of the opinion that the condition is clear on its face and the enforcement one of extreme importance to the quiet enjoyment of the residents. Thus, appellants' contention that the condition is ambiguous and unreasonable is rejected.

II

Appellants contend that the suspension was unlawful unless there was a finding that the violation was contrary to public welfare and morals, arguing that the Department must show that the violation caused offense, annoyance, or distraction to someone. This argument is without basis.

The Department's decision does not cite the California Constitution's public welfare and morals provisions in its Findings of Fact, but does so in its Determination of Issues.

The case of Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85 [84 Cal.Rptr. 113], while not pertinent to the present matter as the factual basis is completely different,[4] was cited by appellants for the proposition that the enforcement of the conditions as a per se violation of public welfare and morals was in error. Boreta's factual determinations and ultimate conclusions are not relevant. However, Boreta's definition of what constitutes the term "public welfare and morals" is universally true and applies in all cases, and also includes the universal statement by the court in footnote 22, at 2 Cal.3d 99, that any violation of a statute (or condition reasonably imposed under a statute) is contrary to public welfare and morals. Public welfare and morals is the ultimate fact. (Martin v. Alcoholic Beverage

[4]The rule set forth in an appellate decision is based upon the facts in that particular case. The rule from a cited case must be cautiously used within a reasonable context of the factual similarities between that cited case and the matter under present review. A decision of a court should not be based on quotations from a factually dissimilar case where such case's facts are not pertinent. (Harris v. Capital Growth Investors XIV (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614].)

Control Appeals Board (1959) 52 Cal.2d 259, 265 [341 P.2d 291, 294], and Bailey v. Department of Alcoholic Beverage Control (1962) 201 Cal.App.2d 348 [20 Cal.Rptr. 264, 267].) Public welfare and morals concerns occurrences on licensed premises and the effects of such conduct. (H. D. Wallace v. Department of Alcoholic Beverage Control (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749].) The public welfare and morals clause permits termination of licenses for law violations not involving moral turpitude, but having a rational basis or relationship with the operation of the premises. (Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.2d 489 [30 Cal.Rptr. 219, 222].) "...[C]onduct constituting a violation of any of the sections of the Alcoholic Beverage Control Act is a ground for the suspension or revocation of the license." (Nelson v. Department of Alcoholic Beverage Control (1959) 166 Cal.App.2d 783 [333 P.2d 771, 773].)

III

Appellants contend that they did not permit the violation, and cite the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2nd. 779], which was actually two cases--Laube and De Lena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity. The Laube case is not in point.

Appellants signed the conditions which were imposed on their license. Condition 2 is adequate notice that noise is not to be audible beyond the area under appellants' control. The violation occurred when two persons, inside a closed auto with the windows up, could hear from a distance of 100 feet to 150 away, the music and the lyrics of the songs which were being presented within the premises, with the premises' windows and doors closed.

With the knowledge appellants had of the potential for a violation of that condition, the facts of this present matter are totally outside the facts of the Laube matter. A mere showing that violations of law took place is sufficient to place a license in jeopardy. Lack of knowledge in this present matter is no defense. (Coleman v. Harris (1963) 218 Cal.App.2d 401 [32 Cal.Rptr. 486]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74]; and Morell v. Alcoholic Beverage Control Appeals Board (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405].)

CONCLUSION

The decision of the Department is affirmed.[5]

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

[5]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.

DISSENTING OPINION FOLLOWS

DISSENT OF JOHN B. TSU

It is my understanding, based upon the remarks of counsel at the hearing, that although the evidence may have shown a violation of the condition of appellants' license regarding audible noise, there had been no current complaints from nearby residents. Under such circumstances, it is my view that fairness would require a warning only, especially where one could have been given so easily in this instance.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD