ISSUED MARCH 10, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SANTA FE SPRINGS REALTY CORP. dba Scamps 7000 Garden Grove Boulevard Westminster, CA 92683, Appellant/Applicant, v. SUSANNE BOGDANOVICH, et al., Respondents/Protestants, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6666 File: 48-306235 Reg: 95034669 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: November 6, 1966 Los Angeles, CA

Santa Fe Springs Realty Corporation, doing business as Scamps (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which sustained the protests against issuance, and denied its application for a person to person transfer of an on-sale general public premises license because it would tend to create a law enforcement problem, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §23958.

Appearances on appeal include appellant Santa Fe Springs Realty Corporation,

[1]The decision of the Department, dated May 31, 1996, is set forth in the appendix.

appearing through its counsel, Roger Jon Diamond; the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein; protestant James Harnett, appearing through his counsel, James A. Anton; protestant Theodore Peacock, appearing through his counsel, Jeffrey P. Walsworth; and protestants Suzanne Bogdanovich, Barbara Bradberry, Dale Bradberry, Kathryn M. Drake, Donetta Evans, H. Vivian Evans, Mary Garcie, Etty H. Johan, John G. Johan Jr., Robert G. Klein, Kathleen Kraisinger, Randy A. Kraisinger, Jerry D. Lumley, Mornette McShane, Howard A. Nagel, Juliana Nagel, Hortensia Navarro, Geniavon Picket, Ruby Pinkston, Ann M. Przygocki, Barbara Reeser, Loren Jae Reeser, Carol Rushman, Carrie Rushman, Ed Rushman, Eugene e. Stegemann, Mark Stewart, Regina Stewart, Ursula S. L. Tan, Elaine Vaughn, Mario J. Veneroso, Gail Wickstrom, John Yantorn, and Pamela Yantorn, representing themselves.

FACTS AND PROCEDURAL HISTORY

Appellant petitioned for the issuance of a conditional on-sale general public premises license on March 1, 1995. Numerous verified protests were received, and the Department scheduled a hearing.

An administrative hearing was held on February 5 and April 10, 11, and 12, 1996, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant had applied for a conditional on-sale general public premises license for a bar featuring topless entertainment.[2] The proposed premises had been

[2] The proposed decision of the Administrative Law Judge recites in Finding II that appellant filed an application for a person to person transfer of an existing license which had been surrendered in June 1994. There does not appear to be a

licensed either as a restaurant or bar with a general license since 1955, and became a Type 48 license exclusively in 1988. The existing premises closed on March 31, 1994.[3] The premises are located in a primarily commercial area, but are in close proximity to a residential neighborhood.

. Subsequent to the hearing, the Department issued its decision which sustained the protests and denied issuance of the license. Appellant filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) the decision violates the free speech provisions of the federal and state constitutions; (2) the decision is violative of California Code of regulations, Title IV, §143.3 (rule 143.3); (3) the decision is violative of a federal court order; (4) the Department improperly relied on testimony of police officers of the City of Westminster; (5) the Department's findings are not supported by substantial evidence; (6) the Department's findings do not support its conclusions; and (7) there were no grounds for denying transfer.

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copy of this application in the record. In Finding IX, the ALJ notes that after concerns were expressed by protestants and after appellant had conversations with Department investigator Viviano, appellant petitioned for a conditional license. From the ALJ's findings and comments of counsel at various times during the hearing, it would appear that all parties treated the application for transfer and the petition for issuance of a conditional license as one and the same.

[3] The licensee, Robert Martin, surrendered the license to the Department in June 1994. Prior to that time, appellant, a corporate entity formed by Martin and others to operate the premises, had been engaged in litigation with the City of Westminster over the City's denial of a conditional use permit. That litigation resulted in the issuance by the United States District Court of a permanent injunction compelling the City to grant the conditional use permit. (Santa Fe Springs Realty Corp. v. City of Westminster, 906 F. Supp. 1341 (C.D. Cal. 1995).) However, appellant was required to undertake certain renovative steps before the premises could resume operations, and this required that the business be closed while the renovation went forward.

This case comes to the Board as an appeal from the Department's action in sustaining protests[4] to the issuance and/or transfer of the license. At the hearings on the protests, the Department, by adopting a position of neutrality, essentially deferred to the opposition to the license presented by counsel for the protestants.

Following the hearings, the Department adopted the proposed decision of the Administrative Law Judge (ALJ), which sustained the protests, and on this appeal has adopted the reply brief of respondents/protestants in its entirety. As a consequence, we do not have the usual guidance of the Department in this matter. Be that as it may, we have been able to review the extensive record, and the briefs and authorities presented by appellant and protestants, and are satisfied that the ultimate decision of the Department is correct.

A brief recital of the background of this case may be useful.

The premises in question have been licensed since 1955. The present licensee, Robert Martin, was licensed in 1988. The premises operated as the Marquee until early 1994, offering hard rock music. In 1994, Martin and others formed a corporation, appellant here, to offer topless entertainment, with the premises to be renamed

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[4] The protestants, who included among them a Catholic priest, a Protestant minister, and, initially, over 70 individuals, had earlier prevailed in their objections to the issuance of a conditional use permit for the premises by the City of Westminster. That decision, however, was overturned by the United States District Court for the Central District of California, which issued a preliminary, and then permanent, injunction compelling the City to issue the permit. Protestants thereafter directed their objections to the Department of Alcoholic Beverage Control, resulting in the hearings on their protests.

Scamps. Their plans were to transfer ownership of the license to the corporation; Martin was to own 50% of the stock, the remainder was to be owned by his investor-partners. The City of Westminster sought to block these plans through application of its zoning laws. Federal court litigation followed; appellant prevailed, and the alcoholic beverage license proceedings began. In the meantime, appellant offers topless entertainment without the sale of alcoholic beverages.

DISCUSSION

I

Appellant contends that the Department's decision violates the free speech provisions of the federal and state constitutions.[5] Appellant argues that since topless dancing is a form of expression protected by the First and Fourteenth Amendments to the United States Constitution and article I, §2 of the California Constitution, it cannot be the basis for a denial of the license transfer requested by appellant. This argument lacks merit.

Appellant cites Doran v. Salem Inn, Inc. (1975) 422 U.S. 922 [95 S.Ct. 2569], in which the Court affirmed, in part, a district court injunction against the enforcement of local ordinances banning topless entertainment in bars and elsewhere, on the ground that the ordinances infringed upon protected expression under the First Amendment. The Court's decision was narrowly drawn, however:

[5] First and Fourteenth Amendments to United States Constitution; California Constitution, article I, §2.

> "Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized in California v. LaRue ... that this form of entertainment might be entitled to First Amendment protection under some circumstances.
>
> (Doran, supra, 422 U.S. at 922 [95 S.Ct. at 2568].)

The Court stressed its holding in California v. LaRue (1972) 409 U.S. 109 [93 S.Ct. 390], that the broad powers granted the states to regulate the sale of liquor by the Twenty-first Amendment outweighed any First Amendment interest in nude dancing. Therefore, a state could ban such dancing as part of its liquor license program. But in Doran, the ban did not just extend to bars, but to any "public place," which, to the Court, could include a theater, town hall, opera house, public market place, street, or any place of assembly, indoors or outdoors. The Court suggested that had the ordinances been more narrowly drawn, such as if it had been limited to places dispensing alcoholic beverages, it might have passed constitutional muster under LaRue.

Appellant argues that in California v. LaRue (1972) 409 U.S. 109 [93 S.Ct. 390], in which the United States Supreme Court upheld the regulations contained in Rule 143.3, no claim was made that topless dancing was not protected activity under the First Amendment. Appellant also points out that the Court has retreated from at least part of the rationale upon which it based its decision in LaRue, citing 44 Liquor Mart, Inc. v. Rhode Island (1996) __ U.S. __ [116 Sup.Ct. 1495], in which the Court struck down Rhode Island's total ban on retail advertising of liquor prices as an undue restriction on commercial speech.

Even though appellant is correct that the Court in 44 Liquor Mart disavowed the

reasoning in LaRue in which it held that the Twenty-first Amendment lent strength to the regulations upheld in that case, the argument does not add to its position here. This is because, as the Court made clear:

> "Entirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations. ... [T]he Court has recognized that the States' inherent police powers provide ample authority to restrict the kind of 'Bacchanalian revelries' described in the LaRue opinion regardless of whether alcoholic beverages are involved ... As we recently noted: 'LaRue did not involve commercial speech about alcohol, but instead concerned the regulation of nude dancing[6] in places where alcohol is served.'"

44 Liquor Mart, supra, __ U.S. at __ [116 S.Ct. at 1514].

The issue, then, is whether the denial of the license is censorship, as appellant contends, or content neutral regulation, as protestants contend.

In City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41 [106 S.Ct. 925], the Supreme Court upheld the City of Renton's enactment of an ordinance which prohibited adult motion picture theatres from operating within 1,000 feet of any residential zone, single or multiple family dwelling, church, park or school, over objections that it violated the First Amendment to the Constitution. The Court concluded that the ordinance was "content neutral," since it was:

> "aimed not at the content of the films to be shown, but rather at the secondary effects of such theatres on the surrounding community. ... The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." 475 U.S. at 47-48 [106 S.Ct. at 929] [Court's emphasis].

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[6] It is worth noting that the "nude dancing" that the Court was referring to in California v. LaRue included topless as well as totally nude dancing.

Of particular significance is the Court's acknowledgment that the City of Renton was not confined to presenting evidence relating specifically to its own problems and needs, but could look to the experiences of other cities:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. That was the case here."
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> (City of Renton, 475 U.S. at 51 [106 S.Ct. at 931].)

In Barnes v. Glen Theatre, Inc. (1991) 501 U.S. 560 [111 S.Ct. 2456], the Court upheld Indiana's public decency statute over contentions that it could not be enforced against totally nude dancing as entertainment. In so doing, the Court acknowledged language in earlier opinions, namely Doran v. Salem Inn, Inc., supra; California v. LaRue, supra; and Schad v. Mt. Ephraim (1981) 452 U.S. 61 [101 S.Ct. 2176], that nude dancing was expressive conduct protected by the First Amendment. The Court went on to say, however, that it viewed nude dancing "only marginally" as "expressive conduct within the outer perimeters of the First Amendment." (Barnes v. Glen Theatre Inc., 501 U.S. at 566 [111 S.Ct. 2456].) Since the Indiana statute was aimed at protecting the state's governmental interest in societal disapproval of nudity in public places and among strangers, and not at prohibiting or inhibiting expression, it withstood constitutional challenge.

City of Renton and Barnes represent what could be said to be a retreat from the Court's earlier decisions addressing First Amendment issues in a sexually-oriented context. While continuing to accept the concept that nudity can be expressive

conduct, the Court is making it clear that undesirable consequences may flow from such activity, and that governmental bodies are not precluded from protecting themselves against such consequences, even if as an indirect result the expressive activity may be restrained or even precluded. As Chief Justice Rehnquist stated for the Court in City of Renton, where the contention was made that the city's ordinance so restricted the amount of land within the city where an adult theatre could locate that there was no "commercially viable" land available: "we have never suggested that the First Amendment compels the Government to ensure that adult theatres, or any kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." (City of Renton, supra, 475 U.S. at 54 [106 S.Ct. at 932].)

California's Supreme Court has also dealt with nude entertainment as a protected form of expression, and has also acknowledged that such activity may be regulated where necessary to protect the public welfare.

In Morris v. Municipal Court (1982) 32 Cal.3d 553 [186 Cal.Rptr. 494], the Court invalidated an ordinance enacted by Santa Clara County which prohibited nude entertainment in any public place other than a concert hall, theatre, or similar establishment primarily devoted to theatrical performances. Appellant cites Morris as authority that the Court has held topless dancing to be a First Amendment-protected activity. To that extent, appellant is correct. However, the Court held the ordinance to be unconstitutionally overbroad because it extended beyond establishments serving alcohol. (See Morris, supra, 32 Cal.3d at 564.) The clear implication of the Morris Court's holding was that had the ordinance been limited to business establishments

involved in the sale of alcoholic beverages, the result would have been different.

In Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113], the Court reversed the Department's revocation of a liquor license held by a bona fide public eating place which employed waitresses whose breasts were displayed and exposed, i.e., topless. The Court criticized the Department for attempting to impose its view of morality in place of that of the general public. At the same time, the Court made it clear that the Department was not without power to regulate such activity:

> "We are not unaware of the public concern for proper regulation of premises licensed to sell alcoholic beverages. Our holding confers upon them neither a general sanction to employ topless waitresses or other similarly undressed waitresses nor a general immunity from the Department's disciplinary action if they do. If such purveying of liquor is in fact attended by the deleterious consequences which the Department claims, it should have no difficulty, in appropriate disciplinary proceedings, in proving them. In a word, it should establish 'good cause' and make out its case. Alternatively, the Department could draw upon its expertise and the empirical data available to it and adopt regulations covering the situation."

(Boreta Enterprises, Inc., supra, 2 Cal.3d at 106.)[7]

The Court expressly declined to consider the licensee's suggestions that the display of bare breasts is a form of expression protected by the First Amendment, stating that it was unnecessary to do so in light of its disposition of the case. Boreta Enterprises, Inc., supra, 2 Cal.3d at 107, n.32.

In City of National City v. Wiener (1992) 3 Cal.4th 832 [12 Cal.Rptr.2d 701],

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[7] The Department responded to Boreta Enterprises, Inc., by adopting Rule 143.3, which regulates in detail the manner in which topless entertainment may be offered by those licensed to sell alcoholic beverages. As discussed infra, appellant contends that the Department's decision in this case violates Rule 143.3.

the Court upheld an ordinance patterned after that in City of Renton, where it was contended that its effect would be to totally exclude an adult bookstore from the city. The Court rejected the claim on a factual basis, but also made it clear that the First Amendment does not prevent a governmental body from taking reasonable content-neutral steps to deal with the secondary problems associated with adult businesses.

Appellant is, as these cases indicate, correct in its assertion that topless dancing has been held by courts to be a protected form of expression under the First Amendment. Appellant, however, must also accept the language in those decisions acknowledging a valid interest on the part of the state in controlling such activities in places where alcoholic beverages are sold.[8] As discussed below, the issue is whether the grounds for the Department's decision are based on substantial evidence or, as appellant contends, are merely pretextual. If the latter, then appellant's constitutional arguments would have greater force.

As the previous discussion shows, even though in some contexts topless dancing may be free from any restraint whatsoever, such is not the case where the privilege of selling alcoholic beverages is concerned. If the sale of alcoholic beverages, coupled with topless entertainment, or any other kind of entertainment, is likely to

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[8] The cases appellant cites as stating that topless dancing is a protected form of expression involve in each instance statutes or ordinances which were found to be unconstitutionally over broad, in that their reach was not limited to areas and subject matters where the sale of alcoholic beverages was involved. (See Doran v. Salem Inn, Inc. (1975) 422 U.S. 922, 932 [95 S.Ct. 2561, 2569]; Morris v. Municipal Court (1982) 32 Cal.3d 553, 561, 563 [186 Cal.Rptr. 494]; City of Rancho Cucamonga v. Warner Consulting Services, Ltd. (1989) 213 Cal.App.3d 1338.)

generate social problems, harm to the community, law enforcement problems or increases in crime, proven to the satisfaction of the Department by substantial evidence in the record as a whole, the Department would be justified in denying a license or a license transfer. So long as the Department's decision is content-neutral insofar as the activity which is regulated is concerned, appellant's rights under the First Amendment have not been infringed.

Much of the opposition to the license is rooted in something other than disapproval of topless entertainment per se. It may very well be that the fears of protestants would be far less if not for their concern over the adverse consequences thought to flow from topless dancing, in the way of diminution in property values, increases in crime and prostitution, littering, and lewd and indecent behavior outside the premises and nearby.[9] Protestants were careful at the Department hearings to couch their opposition to the license transfer on traditional grounds, one of which the ALJ accepted - the granting of the license would tend to create a law enforcement problem. (Determination VII).[10]

The principal issue for the Appeals Board has been to determine whether the findings support this determination, and whether there is substantial evidence in the

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[9] Even the court in Santa Fe Springs Realty Corp. v. City of Westminster, 906 F. Supp. 1341, 1355 (C.D. Cal. 1995), while ultimately ruling that appellant was entitled to a conditional use permit, acknowledged a city's power to minimize, through zoning and building laws, "the adverse effects typically associated with such businesses."

[10] It must be acknowledged that some of the protestants' objections clearly reflected their moral assessment of topless dancing. However, the decision of the ALJ does not rest on these grounds.

record to support the findings. In this case, the ALJ made a Finding and Determination that the issuance of the conditional license would tend to create a law enforcement problem. He relied upon testimony of nearby residents, residents in other parts of the City of Westminster, and law enforcement officials and academic experts (discussed in more detail below), in connection with appellant's attack on the sufficiency of the evidence. The ALJ's Finding and Determination addresses the consequences flowing from the combination of alcohol and topless dancing, and does not pass judgment on the content of the conduct from which the feared undesirable consequences may flow. By doing so, the ALJ has not invaded appellant's constitutional protections, whatever force they may have in light of the recent pronouncements of the Supreme Court.

Appellant asserts that "the topless entertainment will go forward with or without the ABC license." (App.Br., p. 30). Appellant argues that the community would be better off if the license issued, because it would then have more control over the premises. Appellant adds, as a final thrust, that "without the ABC license, [appellant] could, if it chose to do so, present totally nude entertainment, a form of activity which is offensive to many people." (Ibid.) By this threat, appellant has seriously undercut his First Amendment arguments. This is because the assertion that the business is free to go forward with topless entertainment, or even totally nude entertainment, without a license to sell alcoholic beverages, is tantamount to an admission that the denial of the license does not prohibit appellant from engaging in the, albeit marginally,

constitutionally-protected activity.[11]

II

Appellant contends that the "sole basis for the sustaining of the protests ... was topless dancing in general." (App.Br., p. 28). It argues, therefore, that since rule 143.3[12] specifically allows topless dancing at licensed premises, the Department's decision violates that rule. Appellant also argues (App.Reply Br., p. 31) that it is being punished for applying for the conditional license. It contends that since the premises were already licensed to sell alcoholic beverages, the denial of the new license could only be because of the addition of topless dancing.

Appellant misperceives the scope and purpose of rule 143.3. The rule does not by its terms endorse topless dancing or any other kind of adult, sexually-oriented entertainment. It merely states certain restraints on the manner in which such entertainment may be offered, if offered at all, and applies to the activity occurring inside the premises. It contains no standards by which to determine whether the type of entertainment offered may, upon examination of all of the surrounding circumstances, generate secondary effects which would influence the granting or denial of a license to sell alcoholic beverages in the location in question by its tendency to disturb quiet enjoyment or create or aggravate a law enforcement problem.

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[11] At the hearing before the Appeals Board, appellant's counsel argued that appellant was now in a position where it could not do anything with the property. Aside from the fact that the record is silent as to alternate uses to which the property could be put, this argument is flatly contrary to the position asserted in appellant's written brief.

[12] The complete text of this rule is included in the appendix hereto.

Appellant also asserts, incorrectly, that topless dancing was the sole basis upon which appellant's application was denied. (App.Br. 28). The ALJ determined that the issuance of the license would tend to create a law enforcement problem. His proposed decision, which the Department adopted in its entirety, sets forth a comprehensive summary of the evidence and testimony upon which he relied in concluding that the issuance of the license would tend to create a law enforcement problem. His decision did not pass judgment on topless dancing, but was based on the consequences which, on the basis of the evidence presented to him, could reasonably be expected to flow from the operation of the premises as a topless bar in the area where it was located. There is nothing in the ALJ's decision that can be deemed violative of rule 143.3. The decision does not even refer to the rule, and there is no reason it should.

While it is true that topless dancing was a necessary element in the ALJ's review and analysis of the evidence and testimony, and ultimately relevant to his conclusions, it cannot be said that topless dancing was the basis for his decision. The ALJ's decision focused on the fallout from topless dancing - its secondary effects - not the activity itself. (See Findings IV, V, VI, VII and IX.)

This Board cannot close its eyes to the reality that the combination of sex and alcohol can be volatile. Nor, we believe, can it ignore the testimony in this record from experienced police officers and academics who have acquired expertise in this area as a result of their work and study. The ALJ heard their testimony, and was satisfied that their concerns about the creation of law enforcement problems were well-grounded on the facts of this particular case. The Department concurred in his analysis, adopting

his decision without change. Since there is substantial evidence in the record to support the Department's determination, the Board does not have the power to set it aside even if it is so inclined.

Appellant's argument seems to be that since rule 143.3 permits topless dancing, it follows as a matter of law that the Department cannot conclude that such activity can tend to create a law enforcement problem. We disagree. Rule 143.3, while regulating topless dancing, does not preclude a finding or determination that its presence, in particular circumstances, could breed crime or tend to create a law enforcement problem. Rule 143.3 plainly controls only live entertainment on the premises, and, while directed at sexually-oriented entertainment, is not limited to topless dancing. There is nothing in rule 143.3 that addresses the criteria which might be relevant in an application for issuance or transfer situation.

The argument that appellant is being punished for adding topless entertainment to his licensed operation may have surface appeal, but does not withstand examination. The existing license was surrendered in 1994, while the premises were undergoing renovation. At that time the license was owned by Robert Martin, who proposed to sell it to appellant Santa Fe Springs Realty Corporation, a corporate entity in which Martin held only 50% of the ownership. Thus, when the new license was sought, the situation was one wherein a new owner proposed to operate the business in a manner in which it had not previously been operated, i.e., as a business engaged in the sale of alcoholic beverages and offering topless entertainment.

Business and Professions Code §23958 mandates the Department, upon receipt of an

application for a license or for a transfer of a license, to make "a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license ... and shall investigate all matters connected therewith which may affect the public welfare and morals."[13] That mandate necessarily includes the consideration of documented adverse consequences flowing from the new business operation.

III

Appellant contends that the Department's decision violates the federal court order in Santa Fe Springs Realty v. City of Westminster, 906 F. Supp. 1341 (C.D.Cal. 1995). The court entered a preliminary, and later permanent, injunction directing the City of Westminster to issue a conditional use permit to appellant which would permit it to offer both alcoholic beverages and topless entertainment on the premises.

As appellant acknowledges, the Department of Alcoholic Beverage Control was not a party to the federal court proceeding, (App.Br., p. 31), and the injunction entered by the court was not directed at the Department. Consequently, under settled legal principles, the order is without force as to the Department.

The court decision was focused on the manner in which the City of Westminster handled appellant's application for a conditional use permit. Because the City Planning Department had previously rejected an application for a permit for a topless bar at another location, suggesting the location of appellant's premises as one which would be acceptable, and then rejected appellant's application, the federal court concluded

[13] The complete text of §23958 is included in the appendix hereto.

that the denial of the permit was pretextual, and that the real reason was the city's disapproval of the proposed activity to be conducted in the premises.

The federal court found that the City of Westminster had refused to issue the conditional use permit because the premises were to be operated as an adult cabaret offering topless entertainment. Since topless dancing is protected to a degree by the First Amendment, it followed that the conditional use permit could not be denied solely on that ground. The federal district court's opinion made only passing reference to the fact that appellant's premises would offer alcoholic beverages. Thus, the denial of the permit was, in reality, the denial of the right to operate a First Amendment-protected business. There is nothing in the opinion suggesting that the Department of Alcoholic Beverage Control was to be bound by that order.

In the instant case, however, the grounds upon which the license application was denied were other than activities entitled to some measure of First Amendment protection. Appellant's brief attacks these grounds as pretextual, and those contentions are addressed in Section V, below. But, in this case, there is no claim that the denial of the license to sell alcoholic beverages will prevent appellant from offering topless entertainment. Appellant is already doing so, and has made it clear that it intends to go forward with or without a license for the sale of alcoholic beverages. (See App.Br., p. 30; but see note 11, supra).

The federal court was not addressing the issues required to be considered by Business and Professions Code §23958. This is still another reason why the federal district court order has no applicability to the Department's action.

IV

Included among the witnesses called by protestants were Detective Tommy Lee Rackleff,[14] a police officer employed by the City of Westminster, and James I. Cook, Chief of Police of the City of Westminster. Appellant contends that since the City of Westminster had received notice of the license application and, on the recommendation of the police department, elected not to file a formal protest, the ALJ committed error by allowing the police officers to testify. Protestants contend that the police officers were permitted to testify as witnesses called by a party, regardless of the City's decision not to file a formal protest.

Detective Rackleff testified that he had been employed as a police officer for the City of Westminster for 22 years, and that he was currently assigned to the special investigations unit [II RT 12-13]. Rackleff's duties include service as the liaison officer with the Department of Alcoholic Beverage Control [II RT 65].

Detective Rackleff testified that he reviewed the application for the license, and recommended to the Chief of Police that no formal protest be filed. He made this recommendation in the belief that the City lacked legal grounds to object. It is because the City believed it had no legal grounds to object that appellant objects to Rackleff's adverse testimony, and that of Chief Jones.

Appellant contends that since the City of Westminster was given notice of the application, and elected not to protest, its law enforcement officers are thereby barred

[14] Officer Rackleff's name is spelled "Radcliffe" in the ALJ's decision. "Rackleff" is the correct spelling [II RT 9].

from testifying against issuance of the license. The protestants contend that appellant waived this objection by not making it during the administrative hearing.

Appellant misperceives the difference between the role of police officers testifying as official representatives of the City of Westminster and their appearance as either percipient or expert witnesses testifying in the same manner as any other percipient or expert witness. Their testimony is the same in either case. Had the City filed a formal protest, their testimony would not be entitled to any special weight by that mere fact. Here, the fact that Detective Rackleff recommended that no protest be filed because he thought the City lacked legal grounds to protest might go to the weight of his testimony as impeachment material, but no authority has been brought to our attention that would require its exclusion.

Appellant asserts that, in any event, the opinion testimony of Detective Rackleff and Chief Jones was of no value. This contention will be addressed below, in connection with our discussion of the sufficiency of the evidence.

V

Appellant contends that there is no substantial evidence in the record to support the findings (Findings IV, V, VI, VII and IX) and Determinations (Determinations IV and VII) of the ALJ. The key determination (Determination IV) concluded, upon a preponderance of the evidence, that a law enforcement problem would be created if alcohol were allowed at the premises. The ALJ set forth the following factors as the basis for his determination:

> "the fact that a high crime area exists only 1.2 miles down the street from the proposed premises, the fact that the proposed premises plans to offer both

alcoholic beverages and topless entertainment, the fact that topless entertainment predominantly attracts male patrons, the fact that prostitutes are usually attracted to this type of establishment, the fact that the premises holds up to 480 patrons, the fact that there have been complaints regarding indecent exposure, litter and drinking outside the premises since the premises started offering topless entertainment and the testimony of the police officers and sociologists who testified at the hearing by reason of Finding IV, V, VI, VII and IX."

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456]; 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].)

Appellate review 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].)

Appellant argues that there was no specific evidence of any law enforcement problem in this case; it contends that the uncontroverted testimony of the police officers was that there was no crime problem at the premises. Whatever may be said of that contention, police officers and others testified to facts relating to the applicant's premises and the adjacent areas which, in their experienced judgment, would create or

aggravate law enforcement problems.

Testimony at the hearing established that while the level of crime in the vicinity of appellant's premises is low, an area of "high" crime exists one mile down the same thoroughfare on which appellant's premises are located. There was substantial expert testimony, both from law enforcement officials and academics, about the way crime migrates, particularly the kind of criminal conduct involved in the Garden Grove crime area, and the lure the activities on appellant's premises would offer. As seen in Determination VII, it was the combination of this and other factors which influenced the ALJ's conclusions, not a misunderstanding of what the evidence was.

Appellant contends the finding that a law enforcement problem would be created is pretextual, and that there is no evidence to connect Scamps with the "alleged high crime area 1.2 miles away in a different jurisdiction." (App.Br., p. 33). Appellant argues that the ALJ's rejection of the other grounds of protest - interference with quiet enjoyment of nearby residents, traffic problem and proximity of churches, schools and/or playgrounds - implies that the issue of law enforcement is also a false issue.

The ALJ heard lengthy testimony from several law enforcement officers, three academicians, and a number of the protestants, as well as that of the principal officer of appellant. The hearings consumed almost four full days, and generated over 750 pages of transcript.

Finding IV of the ALJ's findings cited testimony of individual protestants who lived near the premises, or who had lived in the neighborhood of similar operations in other cities, who had personally observed various types of objectionable behavior,

including indecent exposure, littering, urinating in public, prostitution activity and the like. This finding also acknowledged an offer of proof by counsel for the protestants to the effect that other individual protestants, if called as witnesses, would testify in a similar manner.

In Finding V, the ALJ summarized the testimony of investigator Viviano regarding his conversations with Detective Rackleff. Rackleff advised Viviano that comparing the prior licensed premises, which offered rock and roll entertainment, with the proposed licensed premises offering topless entertainment, he was of the opinion there would not be a significant increase in law enforcement problems, because the conditions imposed on the proposed license would help to minimize calls to the police.[15]

Rackleff testified at the hearing [II RT 10-120]. He has been a police officer for 22 years, and is the holder of a bachelor's degree in sociology. His testimony is summarized in Finding VII: in his experience, the type of business proposed has a tendency to attract prostitution and other sex offenses [II RT 21-22, 28], males are particularly drawn to such business, and will be engaged in the consumption of alcohol while there [II RT 18]; there have been reports of criminal activities at the business, but without sufficient information to warrant prosecution [II RT 42-44, 90]; he believed the police department had no legal grounds to protest because the premises had previously been licensed for many years [II RT 102]; he believed there would be no significant increase in crime over the level which existed when the license was active

[15] These conditions, which go to such things as hours of operation, noise control, prohibition of sale for off-premises consumption, lighting, security, policing of litter, etc., are set forth in Exhibit 3 of the record.

prior to March, 1994 [II RT 13, 21-22, 28, 35, 80-81, 110], a time when the police "had a significant amount of problems [II RT 35].

James Cook, Chief of the Westminster Police Department, testified that in his professional opinion and based upon his prior experience with topless bars, this type of business tends to attract criminal activity such as narcotics, prostitution and crimes in general, and that he believed the granting of the proposed license would create a law enforcement problem in the area of the premises [III RT 92-98, 101]. Chief Cook has been a law enforcement official for 34 years; he has been Chief of Police for Westminster 8 of those years [III RT 88]. He also holds a bachelor's degree in social science and a master's degree in criminal justice public administration [III RT 89]. Chief Cook's opinion is also cited in Finding VII.

Dr. Richard McCleary, a professor at the University of California Irvine campus, has taught classes in sociology, statistics, criminology and criminal justice, has authored four books and numerous articles on criminology and statistics, and has consulted with the United States Secret Service, the Federal Bureau of Investigation and the California Youth Authority on law enforcement-related matters [III RT 124-127]. Dr. McCleary also was under a contract with the City of Garden Grove to analyze "the relationship between adult business locations and crime and the quality of life broadly defined" [III RT 130]. He testified that his research for the City of Garden Grove included the area of Garden Grove Boulevard. Dr. McCleary also testified that he was familiar with the location of appellant's premises, and had made notes and compared features of the area to the areas he had studied for the City of Garden Grove.

After the sustaining by the ALJ of a number of foundational objections, Dr. McCleary was permitted to testify that, in his opinion, that the reinstatement or continuance of a liquor license at Scamps would aggravate police problems [III RT 150]. According to Dr. McCleary, his research shows an interaction between the presence of a liquor license and adult businesses:

> "Adult businesses are associated with a certain public safety hazard. Liquor licenses are associated with a certain public safety hazard. When you have these two factors in congruence, that is, together within 500 feet, you have a multiplied effect, an effect that is much larger than the sum of the two effects." [III RT 154].

Dr. McCleary observed that while Scamps could not sell alcoholic beverages for off-premises consumption, a nearby licensee could [III RT 179].

Dr. McCleary was extensively cross-examined by counsel for appellant, and acknowledged, among other things, that he was unaware of the proposed imposition of 12 conditions on the license, if granted.

James Meeker, a UCLA professor, holder of doctoral and law degrees, and author of a number of articles, also testified as an expert witness for protestants. Dr. Meeker worked with Dr. McCleary in connection with the study performed for the City of Garden Grove. He testified that, in his opinion, the reinstatement or continuance of the liquor license at Scamps would be detrimental to the public welfare of the 1000-foot radius area surrounding Scamps [III RT 191-192]. His opinion was based on the research he had done for the City of Garden Grove, where the residential areas involved were fairly similar to the Westminster areas in question [III RT 192]. He found that the "civilian" and "real estate" surveys:

> "unequivocally demonstrated a negative impact in terms for [sic] individuals, their quality of life, increased noise, increased crime, increased trash, increased traffic, and a decrease in the quality of life.
>
> "The real estate agents were also unanimous in terms of their opinions in a decrease."
>
> [III RT 193].

Dr. Meeker echoed Dr. McCleary's observations about the relationship between alcohol and adult entertainment. "It's the coupling of adult entertainment with the sale of alcohol on the premises what [sic] is theoretically and empirically relevant to the incidence of crime." [III RT 201].

A third expert witness, Veronica Thomas, holder of a doctorate degree in psychology, and a specialist in criminal forensic psychology who has treated "thousands" of individuals charged with or convicted of crimes [IV RT 24], opined there was a direct correlation between the combination of adult entertainment and alcohol, and crime [IV RT 34].

Finally, Lieutenant Kevin Reiny, a 19-year vice and narcotics detective for the City of Garden Grove, testified, based upon his experience, that prostitution would increase in the area of appellant's premises and the surrounding area if the license was reinstated [IV RT 105].

The ALJ made express references in his findings (Finding VII) to the testimony of the witnesses discussed above. We think the case law supports the ALJ in his acceptance of that testimony and his conclusion that there would be a sufficient increase in the level of crime so as to create a law enforcement problem and negatively affect the public welfare.

Protestants relied upon the California Supreme Court's opinion in Kirby v. Alcohol Beverage Control Appeals Board (Schaeffer) (1972) to justify their reliance on expert opinion testimony. That case involved an application for an off-sale beer and wine license in Isla Vista, a college community adjacent to the University of California at Santa Barbara. The Department denied the application, in large part on the basis of the opinion testimony of the Sheriff of Santa Barbara County regarding the consequences which were likely to occur if the license was granted. The Board reversed the Department, and in turn was reversed by the Supreme Court. The license applicant had argued that the Sheriff's testimony about the relationship between crime and intoxication and the likelihood that the premises might aggravate police problems was mere opinion testimony and wholly speculative. The Court rejected this argument, stating:

> "As the cases make clear ... the Department's role in evaluating an application for a license to sell alcoholic beverages is to assure that the public welfare and morals are preserved 'from probable impairment in the future.' ... Of necessity, in appraising the likelihood of future harm to the public welfare, the Department must be guided to a large extent by past experience and the opinions of experts. ... '[I]t should be borne in mind that the proposed business is not yet in operation and the attempt to assess its future impact on public welfare and morals must be and is based on experience, sound reason and evidence in the record.
>
> (Kirby, supra, 7 Cal.3d at 441 (Court's emphasis).)

The United States Supreme Court has also approved the use of opinion testimony drawn from experience in other locations that is predictive of consequences in the location under consideration. In City of Renton v. Playtime Theatres, Inc., supra, the Court stated:

> "The First Amendment does not require a city, before enacting such an

> ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses."

(City of Renton, supra, 475 U.S. at 51-52.)

This Board believes that this reasoning should apply with equal force to determinations by the Department as to the consequences which are likely to flow from the operation of appellant's business[16] - consequences characterized by Chief Justice Rehnquist as "the undesirable secondary effects of such businesses." (City of Renton, supra, 475 U.S. at 49 [106 S.Ct. 929].)

VI

Appellant asserts the Department found that topless dancing brings prostitution, and that this conclusion is factually untrue. (App.Br., p. 35.) Appellant also attacks the findings as "preposterous," and asserts that the reference to a nearby high crime area could only have been referring to an area populated by adult bookstores and other businesses frequented by male homosexuals, unlikely to be attracted to the premises. This argument ignores the opinion testimony of the expert witnesses who, based upon their research and/or actual experience in the field, testified that prostitutes will be attracted to premises which have the capacity, based upon their rated occupancy in a previous incarnation, to accommodate as many as 450 persons [III RT 211], mostly

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[16] It must be kept in mind that, while appellant is currently offering topless entertainment, it is doing so without also offering alcoholic beverages; at the time of the hearings, appellant was operating on Friday and Saturday nights, and drawing from 30 to 40 customers nightly. (III RT 213]. Appellant's co-owner, Robert Martin, hopes and anticipates that the volume of business will increase substantially if it offered alcoholic beverages [III RT 211, 236, 251].

males, many or most of whom can be expected to consume some amount of alcohol, a number of whom may be potential customers for whatever wares may be offered.

Appellant's contention that topless dancing and alcoholic beverages do not bring prostitution is unsupported by the record evidence, and since it only reflects counsel's personal view, is unpersuasive. That view certainly is not in keeping with the views of the witnesses who testified in the hearings. For example, Lieutenant Kevin Reiny, a 19-year veteran of the Garden Grove Police Department, whose present assignment is lieutenant in charge of the detective division and supervisor of the vice narcotics unit, was asked on cross-examination, with respect to the 20 topless bars he had visited, either in the course of his duties or otherwise, in five different cities:

> Q. Based on your experience, are prostitutes found at all the topless bars that you have been to?
>
> A. The topless bars that I have been to, yes, sir.
>
> Q. Every topless bar you have been to you have found prostitutes?
>
> A. Either inside the bar or in the immediate vicinity or thoroughfare surrounding that location, yes.
>
> [IV RT 106-107].

Lieutenant Reiny had testified on direct examination that, based upon his education and his experience as an undercover vice and narcotics investigator, it was his opinion that such things as littering of trash and condoms, loitering, and prostitution, as described by other witnesses, would increase in the area of Scamps and the surrounding area [IV RT 105].

VII

Appellant's final contention is that Business and Professions Code §23958 does not permit the denial of a license based on the fact that its issuance would tend to create law enforcement problems when what is involved is a person to person transfer.

Protestants contend that appellant waived this issue because at no time in the hearings before the ALJ did it object to the ALJ's framing of the issues to be litigated, one of which was whether "issuance of the license would create a law enforcement problem in the area" pursuant to Business and Professions Code §23958. (See I RT 9.) Appellant argues that since the issue was at that time immaterial, litigating it was not a waiver.

Appellant cites the language of the statute as supportive of its position. The first paragraph refers to an application for the issuance of a license or for the transfer of a license, while the second paragraph, which contains the "law enforcement problem" language refers only to an application for a license if "issuance of such a license" (emphasis added) would tend to create a law enforcement problem ... ." Appellant argues that the omission of any reference to transfer in the second paragraph indicates that only an initial issuance of a license was subject to the law enforcement problem condition.

Language in Greve v. Leger, Ltd., (1966) 64 Cal.2d 853 [52 Cal.Rptr. 9, 14], refutes appellant's argument. That case involved a contractual arrangement where the alcoholic beverage license was part of the security for performance of a real estate contract. Rejecting the lower court's assumption that the purchaser's undertaking to have his name removed from the license in the event of his default under the

agreement would automatically effect a transfer of the license without official approval, the Supreme Court stated:

> "... [All] licenses are issued only to specific individuals for use at specific locations (Bus. & Prof. Code, §24040), and all transfers are subject to official investigation and approval in the same manner as the initial issuance of a license. (Bus. & Prov. Code, §§24070, 23958, 23987, 23988.) ...
>
> "The requirement for such approval is an implied condition of all agreements for the transfer of alcoholic beverage licenses, whatever the context and whatever the nature of the consideration."

Additionally, it seems clear that problems could arise, as in this case, from a change in ownership accompanied by a material change in style of operation, that would adversely affect law enforcement. In such circumstances, the Department's hands ought not to be tied.

On the basis of the record that has been brought to us, we are convinced that the decision of the Department is well-founded and must be affirmed.

CONCLUSION

The decision of the Department is affirmed.[17]

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

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[17]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.