

ISSUED MARCH 25, 1997

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

ABDOL R. MOUSSAVI	)	AB-6699
dba Texaco)	
3232 East Chapman Avenue	)	File: 20-307041
Orange, California 92667,	)	Reg: 96035360
Appellant/Applicant,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
JOHN R. ROBERTSON)	
Respondent/Protestant, and	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	February 5, 1997
BEVERAGE CONTROL	)	Los Angeles, CA
Respondent.)	
)	

Abdol R. Moussavi, doing business as Texaco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which sustained the protest against his application for a premises-to-premises transfer of his off-sale beer and wine license and denied the transfer on the grounds that transfer would interfere with the quiet enjoyment of residents within 100 feet of the proposed premises, would result in an undue concentration of licenses, would create a law enforcement problem, and would be within 600 feet of a school, and thus contrary

¹ The decision of the Department, dated July 18, 1996, is set forth in the appendix.

to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22.

Appearances on appeal include appellant Abdol R. Moussavi, appearing through his counsel, Joshua Kaplan; the Department of Alcoholic Beverage Control, appearing through its counsel Matthew G. Ainley; and protestant, John R. Robertson, Police Chief, City of Orange.

FACTS AND PROCEDURAL HISTORY

Appellant filed an application for a premises-to-premises transfer of an off-sale beer and wine license to a gasoline station/mini-mart business owned by him in the City of Orange. Following its investigation of the application, and the receipt of protests, the Department denied the application. An administrative hearing was held on June 13, 1996, following which the Administrative Law Judge (ALJ) issued a proposed decision sustaining the denial. The Department adopted the decision on July 18, 1996. Appellant filed a timely notice of appeal.

The Department's decision rested on four separate grounds: (1) the sale of alcoholic beverages would interfere with the quiet enjoyment of their properties by elderly residents of a retirement home located next to applicant's premises, contrary to Rule 61.4 (Title 4, California Code of Regulations, §61.4); (2) issuance of the license would result in an undue concentration of licenses under Business and Professions Code §23958, and the City of Orange has not issued a certificate of public convenience and necessity; (3) issuance of the license would create or

add to an existing law enforcement problem; and (4) the premises are located within 600 feet of a school.

Appellant raises the following issues: (1) the decision and findings are not supported by substantial evidence; (2) appellant was denied equal protection in that a license was granted to a competing supermarket; and (3) appellant was denied due process in that the City of Orange unfairly refused to act upon his request for a certificate of public convenience and necessity.

DISCUSSION

I

Appellant contends that there is not substantial evidence in the record to support the findings, and that the findings are of "no legal significance," are "totally unreasonable, totally incredible and of no value" except to evidence a "malicious scheme" to deny appellant equal protection (App.Br., p. 17). We interpret this contention to be an attack on the sufficiency of the evidence and treat it as such.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 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].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The Department presented the testimony of the investigator who conducted the investigation upon which the Department based its denial of appellant's application, the testimony of the chief of police of the City of Orange, two other police officers, and a police statistician, regarding crime problems in the area. In addition, a police officer representing protestant Robertson also testified, as did the administrator of a nearby school.

Investigator Goldberg testified that, based on population figures from the 1990 census, three off-sale licenses would be permitted within the applicable census tract, but seven already exist. As a result, the issuance of the license would result in an undue concentration of licenses. Appellant suggests that, since investigator Goldberg relied on 1990 census figures, and did not know if there had been any population changes since that time, her conclusion that there was an undue concentration was unreliable. However, appellant offered no evidence of any population increase, and the record is otherwise silent with respect to whether there was any increase in population in the census tract under consideration. In any event, we find it extremely doubtful that an increase in population of a magnitude sufficient to alter the imbalance between population and existing licenses would have taken place.

Additionally, investigator Goldberg testified regarding the presence of a retirement home housing 67 elderly residents located only 15 feet from the proposed premises. Given the proximity of these residents, it was appellant's burden under Rule 61.4 (Title 4, Calif. Code Reg., §61.4) to establish that the operation of the business would not interfere with the quiet enjoyment of those residents. The ALJ concluded that appellant had not satisfied that burden.

The Department also found that issuance of the license would contribute to a crime problem, based upon the testimony of protestant Robertson, chief of police for the City of Orange. Chief Robertson testified about problems concerning

intoxicated persons on the streets, public consumption of alcoholic beverages, theft of alcoholic beverages, fights and littering. He also testified concerning the number of service calls to the area, and the presence of gang activity. While appellant disputes the significance of this testimony, it is relevant evidence, and the ALJ was entitled to consider it.

Finally, the Department found that the premises were located within 600 feet of a school, and that transients often go to the school grounds to loiter, consume alcoholic beverages and to sleep.

Appellant argues that in light of appellant's willingness to agree to a large number of conditions ordinarily utilized by the Department to protect nearby residents against any disturbance on the license, as well as to conditions exacted by the City of Orange in connection with its issuance of its conditional use permit, the refusal of the Department to permit the transfer was unreasonable. However, the Department could well have concluded that the mere existence of conditions would not be enough to prevent the consequences it feared might flow from the sale of alcohol, given the characteristics of the neighborhood where appellant's premises are located.

There is sufficient evidence in the record, which, if accepted, would support the Department's exercise of discretion as reasonable. Therefore, we reject the contention that the findings are not supported by substantial evidence.

Appellant also claims that he was denied equal protection of the law, in that the Department granted an on-sale general license to an Albertson's grocery store located in the same census tract as appellant's premises. The Department argues that appellant's contention that he was accorded disparate treatment is without merit, asserting that the two applicants were not similarly situated.

The Department stresses the fact that the grocery store had applied for a different type of license - a type 21 instead of a type 20. In addition, the grocery store would serve people doing their overall food shopping, rather than people merely seeking a few items plus an alcoholic beverage. Further, the grocery store is not immediately adjacent to the retirement home, as are appellant's premises. Although the Department suggests that the grocery store had obtained the approval of the City of Orange, there is no explicit record support for this observation.

As the Department notes, the sale of alcohol is a heavily regulated activity involving an intimate relationship with the public welfare. (Allied Properties v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 141 [346 P.2d 737, 740].) Since a person does not have a fundamental right to pursue such an occupation, a classification based upon a rational relationship to a reasonable governmental objective does not impinge on a fundamental right. (Hardy v. Stumpf (1978) 21 Cal.3d 1, 7-8 [145 Cal.Rptr. 176, 179].) Where such a challenge is made, the burden is on the person making that challenge. (D'Amico v. Board of Medical Examiners (1974) 11 Cal.3d 1, 16-17 [112 Cal.Rptr. 786].) The ALJ's

proposed decision, adopted by the Department, indicates that appellant did not satisfy that burden.

III

Finally, appellant contends that his business would satisfy a public convenience and necessity, by offering one-stop shopping to customers by offering a wide range of products to customers who also wish to buy beer or wine. However, appellant asserts, the City of Orange has failed to provide a letter of Public Convenience and Necessity, which would justify a departure from the undue concentration provisions of Business and Professions Code §§23958 and 23958.4. Appellant contends that the city's failure or refusal to provide such a letter is a denial of due process, and that as a result, the Department's action is also a denial of due process. The Department, on the other hand, points out that it has no control over the actions of the City of Orange, and that absent such a certificate, the Department is precluded as a matter of law from issuing the license.

Correspondence between appellant and officials of the City of Orange suggests that the city has been less than cooperative in addressing appellant's attempts to obtain the certificate of convenience and necessity. Although the city appears to have a procedure in place for the consideration of such applications, appellant's correspondence has not generated either approval or rejection. However, there is no evidence that suggests any Department responsibility for the city's actions, so there is no basis for the contention that the Department has

denied appellant due process. Appellant's complaint lies with the city. There is no indication that appellant has challenged the action of the city in any other forum, and it is clear the Department cannot compel the city to act. The Appeals Board lacks the ability to further address this situation.

CONCLUSION

Having considered appellant's contentions and being of the opinion that they lack genuine merit, we affirm the decision of the Department.²

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

² This final order is filed as provided in 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.