ISSUED OCTOBER 23, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JOSEPH L. VOGL 1011 Manhattan Avenue Hermosa Beach, CA 90254, Appellant/Protestant, v. JOHN BOWLER dba Fat Face Fenner's Falloon 837 Hermosa Avenue Hermosa Beach, CA 90254, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6753 File: 47-306993 Reg: 95033858 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Joseph L. Vogl (protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which refused to sustain his protest against the person-to-person and premises-to-premises transfer of an on-sale general public eating place license to John Bowler (applicant), doing business as Fat Face Fenner's Falloon.

Appearances on appeal include protestant Joseph L. Vogl, appearing through James Lissner; applicant John Bowler, appearing through his counsel, Benjamin P.

[1]The decision of the Department dated October 3, 1996, is set forth in the appendix.

Wasserman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicant has held an on-sale beer and wine public eating place license (type 41) since January 12, 1976. On March 27, 1995, he filed an application with the Department for a person-to-person and premises-to-premises transfer to him of an on-sale general public eating place license (type 47). The Department investigator who reviewed the application recommended that the application be granted. Applicant now holds an interim type 47 license with several conditions attached.

Protestant, along with two others, filed protests against the application to transfer the type 47 license alleging that issuance would interfere with the quiet enjoyment of the nearby residents, create increased law enforcement problems, and add to an undue concentration of on-sale retail licenses in the area.

An administrative hearing was held on January 4, 1996, at which time oral and documentary evidence was received. The Administrative Law Judge (ALJ) issued his proposed decision on January 5, 1996. On May 21, 1996, the Department issued its decision under Government Code §11517, subdivision (c), remanding the matter back to the ALJ "to receive further evidence on all matters germane to this proceeding, including without limitation the issues of undue concentration of licenses, public convenience and necessity, and interference with residential quiet enjoyment." The matter was heard on remand on September 6, 1996, and the ALJ issued his proposed decision on September 13, 1996. On

October 3, 1996, the Department adopted the ALJ's proposed decision as its decision.

The Department determined that issuance of the license would not tend to create law enforcement problems; would result in an undue concentration of licenses in the census tract, although there would be no net increase in the number of licenses, but that public convenience or necessity would be served by issuance of the license; and would not interfere with the quiet enjoyment of the nearby residents.

Protestant thereafter filed a timely notice of appeal. In his appeal, protestant raises the following issues: 1) the Department's finding that Fat Face Fenner's Falloon is an "upscale restaurant which attracts an affluent clientele desiring fine dining" is not supported by substantial evidence in light of the whole record; 2) the Department's decision is arbitrary since the Department has failed to adopt standards susceptible of meaningful review on the issue of public convenience or necessity; and 3) the applicant failed to carry his burden of proving that operation of the premises would not interfere with the quiet enjoyment of their property by residents within 100 feet of the premises, as required by Rule 61.4 (Cal. Code Regs., title IV, §61.4).

DISCUSSION

I

Protestant contends the Department's finding that Fat Face Fenner's Falloon is an "upscale restaurant which attracts an affluent clientele desiring fine dining" is not supported by substantial evidence in light of the whole record.

Protestant argues that a restaurant with a name like "Fat Face Fenner's Falloon," which is "essentially a pub, beer, wine, soup, salads, casual neighborhood dining spot" [RT 30 (1/4/96)], is not reasonably characterized as an "upscale" restaurant. Therefore, protestant alleges, "It was error for the ALJ . . . to find and base its decision regarding public convenience or necessity on the fact that Fat Face Fenner's Falloon is an 'upscale restaurant which attracts an affluent clientele desiring fine dining.'" (App. Br., pp. 6-7.)

It appears that protestant is really asking this Board to substitute its judgment of the evidence for that of the Department and the ALJ. When, as here, 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 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 [95 L.Ed.

456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

At the administrative hearing, there was testimony from the Hermosa Beach Chief of Police and from Department investigator McElroy characterizing applicant's premises as "a nice restaurant" [RT(9/6/96) 29] that attracted "upscale" clientele [RT(9/6/96) 137, 143]. Applicant's menu and copies of eight awards that applicant had received for food and service at the premises were presented as exhibits. [Ex. A, C (9/6/96).] Protestant states, without explanation, that "A 'pub' that is primarily a hamburger place and is called 'Fat Face Fenner's Falloon' is not an upscale dining establishment." (App. Opening Br. at 6.) Protestant's own admonition, on the same page 6 of his brief, that "Wishing it does not make it so," could aptly be applied to his own statement.

In any case, the characterization of applicant's premises as "upscale" was not the sole basis for the Department's determination that public convenience or necessity would be served by issuing the license. Another major factor was the existence of sufficient demand in general in the area caused by tourists, local businesses, and local organizations. (Finding I.B., Det. of Issues III.C.)

In light of the whole record, we must conclude that there is substantial evidence, wholly uncontradicted, to support the Department's determination of public convenience or necessity.

II

Protestant contends that the Department has not provided any standard for judging "public convenience or necessity," leaving all parties without guidance as to what must be shown to overcome the license prohibition of Business and Professions Code §23958, and that public convenience or necessity was not shown in this case, no matter what standard might be used. Therefore, appellant concludes, the action of the Department in this matter was arbitrary and capricious.

Appellant refers us to language in Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729] that appears to support his contention that the lack of definition of "public convenience or necessity" makes any determination by the Department of public convenience or necessity faulty. Indeed, some of the language quoted by protestant (albeit out of context) does seem to support his position:

> "The real problem stems from the fact that neither the statute nor the Department's rules contains any definition of the term 'public

> convenience or necessity' as that term is used in section 23958, nor do they indicate just what criteria (apart from criteria relevant to determination of 'undue concentration') are denoted by that concept."

(Sepatis, supra, at 99.)

> What protestant ignores here is the language following that just quoted:
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> "And case law from other contexts provides scant guidance. The Supreme Court has observed that the phrase 'public convenience and necessity' (arguably more restrictive because of the conjunctive) 'cannot be defined so as to fit all cases. . . . [Its] meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found.' (San Diego etc. Ferry Co. v. Railroad Com. (1930) 210 Cal. 504, 511-512 [292 P. 640].)"

(Sepatis, supra.)

The language from San Diego Ferry Co. quoted above points up the inherent impossibility of providing a universally applicable "definitive definition" of a context-sensitive term like "public convenience or necessity."

Protestant also chastises the Department's failure to set "standards susceptible of meaningful review" with regard to public convenience or necessity, asking "Could a T-shirt shop get an alcohol license based on its ability to 'attract tourists to the area'? Could a designer dress shop, because it attracts an 'upscale clientele'?" (App. Br. at 11.) The Sepatis case answers protestant's questions.

The Appeals Board reversed the decision of the Department in Sepatis, generating the applicant's petition for review by the appellate court. The Appeals Board reasoned that the focus in application proceedings must be "upon the number and location of premises in which alcoholic beverages may be obtained, rather than upon the character of particular premises or expression of public

preferences among premises." (Sepatis, supra, at 100.) The court, as noted by protestant in the present appeal, also had some concerns about basing public convenience or necessity on subjective factors such as those just mentioned. The court said: "If the Department were to proceed in that direction without adopting standards susceptible of meaningful review, the denial of a license for failure of the applicant to show public convenience or necessity, might well give rise to meritorious claims of arbitrary administrative action. [Italics in original.]" (Sepatis, supra.)[2] However, following its expression of concern, the court concluded that the Department's determination of public convenience or necessity is not restricted to considerations of "the number and location of premises in which alcoholic beverages may be obtained," and "that matters of aesthetics and predicted mode of operation are not beyond [the Department's] reach in exercising its discretionary powers."

The court then declined to provide a "definitive" definition of "public convenience or necessity," finding it unnecessary in light of the discretion accorded the Department in deciding whether or not issuance of a license would be contrary to public welfare or morals:

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[2] Protestant quotes this language and then states, without explanation, "Clearly, the reverse of this would apply here." (App. Br. at 12.) We assume that protestant means that, without adopting "standards susceptible of meaningful review," the approval of a license based on public convenience or necessity "might well give rise to meritorious claims of arbitrary administrative action." Since the court, by its use of italics, seemed to limit its statement to denial for failure to prove public convenience or necessity, and since protestant has not explained why "the reverse . . . would apply here," (or even what he means by that statement), we decline to extend the import of the court's statement as urged by protestant.

> " '[T]he department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject. . . . Where the decision is the subject of choice within reason, the Department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals board or the court may not interfere therewith. [Citations.] Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises. [Citations.]' "

(Sepatis, supra, at 102, quoting Koss v. Dept. Alcoholic Beverage Control (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219].)

We will follow the reasoning of the court in Sepatis. While a "definitive" definition of "public convenience or necessity" might be helpful in some instances, a lack of one does not make the Department's decision arbitrary and capricious, as long as it is one within reason. The fact that it "does not meet the standards the protestants would choose" (App. Reply Br. at 9) does not mean that there are "no standards susceptible of meaningful review for invoking the exception." The standard to which the Department must adhere is "the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject." (Koss v. Dept. of Alcoholic Beverage Control, supra, quoted in Sepatis v. Alcoholic Beverage Control Appeals Board, supra.) The Department has adhered to that standard in this case.

III

Appellant contends that the Administrative Law Judge (ALJ) made no findings as to how the conditions agreed to by applicant would ensure that

issuance of the license would not interfere with the quiet enjoyment of their property by the nearby residents, and, therefore, it was error for the ALJ to determine that the license conditions established that there would be no such interference. Protestant states there was testimony by protestants at the administrative hearing about problems of "litter, traffic, parking, noise, public intoxication, assaults and vandalism exist[ing] in the area where Fat Face Fenner's Falloon is located," but "applicant presented no evidence on this issue." (App. Reply Br. at 14.) Since these allegations went unanswered, protestant concludes, applicant did not meet the burden of proof imposed by Rule 61.4.

The ALJ's determination about the Rule 61.4 question had two bases: 1) the same factors showing that a law enforcement problem would not be created also show that the quiet enjoyment of the nearby residents would not be disturbed, and 2) the conditions agreed to, which were listed in the Department's decision, were further evidence that quiet enjoyment would not be interfered with. (Det. of Issues III-C.)

Here again protestant is asking this Board to go behind the Department decision and to reach a result different from that which the Department reached. Applicant met his initial burden of showing that operation of the premises would not interfere with the quiet enjoyment of the nearby residents during the application process, in part through the conditions he agreed to have imposed on the license. There is substantial evidence in the record on appeal to support the Department's determination, which, while perhaps not the only reasonable one, is not

unreasonable. Under these circumstances, this Board can find no reasonable basis for reversing the Department's decision.

Appellant and his fellow protestants are clearly concerned about the impact that the sale and consumption of alcohol has on their community. However, they have failed to show any connection between the problems they allege and the proposed operations on the particular premises in question.

Applicant already has a beer and wine license; the present application is simply to add distilled spirits. Even if protestant prevailed, alcoholic beverages would still be sold at this premises. Protestant has not shown how the addition of distilled spirits would create a worse situation.

CONCLUSION

The decision of the Department is affirmed.[3]

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

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.