ISSUED NOVEMBER 12, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TRE AMICI, INC. dba Trattoria Mamma Anna 644 Fifth Avenue San Diego, CA 92101, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6781/82 File: 47-304018 Reg: 95034455/96035139 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Tre Amici, Inc., doing business as Trattoria Mamma Anna (appellant), appeals from two decisions of the Department of Alcoholic Beverage Control[1] the first of which suspended appellant's on-sale general public eating place license for 15 days, and the second conditionally revoking the license for a probationary period of one year and ordering a 20-day suspension, both for violations of a condition on the license mandating that the doors of the premises be closed except in certain enumerated instances, being contrary to the universal and generic public welfare

[1]The first decision of the Department dated November 13, 1996, and the second decision of the Department dated November 8, 1996, are set forth in the appendix.

and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §§23804 and 24200, subdivision (a).

Appearances on appeal include appellant Tre Amici, Inc., appearing through its counsel, William A. Adams; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 18, 1995. Thereafter on October 16, 1995, the Department instituted an accusation alleging that on four separate occasions, August 10 and 19, and September 9 and 14, 1995, appellant's premises' doors were propped open in violation of condition 8 of its license which states: "The doors, both entrance and exit, shall remain closed at all times, except to allow ingress, egress of patrons, and to allow deliveries and in cases of emergency." Appellant was advised of the condition violation on August 10, 1995, by a police officer, and by a Department investigator on September 9, 1995 [RT 11-12].

On January 8, 1996, the Department instituted a second accusation alleging that on seven separate occasions, September 22, October 14, and November 2, 8, 16, 22, and 28, 1995, appellant's premises' doors were propped open in violation of condition 8.

An administrative hearing was held on April 23, 1996, which considered both accusations, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department in the first accusation matter,

tentatively rejected the Administrative Law Judge's proposed decision, but after receiving briefs in the matter, accepted the proposed decision as the Department's decision.

In the second accusation matter, the Department rejected the Administrative Law Judge's proposed decision and issued the Department's own decision pursuant to authority granted in Government Code §11517, subdivision (c).[2]

In its appeal, appellant raises the following issues: (1) the violation of the condition is a moot question as the need for the condition no longer exists; and (2) the penalty is excessive.

On June 2, 1997, the Appeals Board received appellant's brief. At the Appeals Board's hearing of oral arguments, appellant's new counsel argued certain issues. Without direction as to which issues appellant considers germane to appellant's cause, the Board has combined the issues raised in appellant's brief and at oral argument and will base this review on those issues.

DISCUSSION

I

Appellants contend the violation of the condition is a moot question as the need for the condition no longer exists, arguing that the original condition was imposed to control noise from live entertainment offered by the prior licensee.

[2]The proposed decision of the Administrative Law Judge is set forth in the appendix.

Appellant apparently does not provide live entertainment, as so argued, the reason for the condition no longer exists.

An explanation of the respective powers of the Department and the Appeals Board may clarify some of the confusion as to the privileges and responsibilities of the Department, the Appeals Board, and appellant.

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing a Department decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.[3]

Appellant has been granted a license. While a property right, retention of the license is conditional upon appellant's conformity to the laws, rules, and regulations which may impact the license and are existing during the license's tenure.

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[3]The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Condition 8 is a lawful obligation of the license, upon which appellant must operate until such condition is properly changed or modified as provided by law.[4]

The history of the license shows that a petition for conditional license was signed by a previous owner of the license and appellant, in the process of transferring the license to it, accepted and therefore became bound by those conditions. Conditions are written restrictions on the exercise of the privileges of the license. The preamble to the conditions (the reasons or circumstances which caused the imposition of the conditions) states that the parking lot of the premises was within 100 feet of a residence and that California Code of Regulations, title IV, §61.4 (rule 61.4) applied; the San Diego Police Department protested the issuance of the license on the grounds of an existing police problem; and, there was also a reference to noise.

It is true that there was a nearby resident which by the resident's location, caused rule 61.4 to be applicable. Rule 61.4 is a very important rule of the Department. It states, in pertinent part: "No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which ... the premises or the parking lot ... are located within 100 feet of a residence." So important is the peace and tranquility of residents in their homes, that the United States Supreme Court has declared its concern for the tranquility of

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[4]Business and Profession Code §23803 states in pertinent part: "The Department ... upon a petition of a licensee ... if [the Department is] satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal."

residential areas and the need for such residents to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471[100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440, 49 L.Ed.2d 310], and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

Appellant argues that the former licensee offered live entertainment at the premises, as attested to, by condition 1 which allowed live entertainment, and, condition 9 which restricted noise generated by the live entertainment, being heard beyond the premises location. Appellant does not provide live entertainment to the extent provided by the previous owners.

Appellant also argues that where circumstances change, a condition may be eliminated or modified. While a true statement, appellant's license is subject to faithful adherence to the specific wording of condition 8. If appellant determined that the condition no longer applied, its only course of action was to seek modification or elimination of the condition and to obtain a written decision from the Department modifying or eliminating condition 8. The unilateral action of appellant to keep its doors open was improper.

Appellant's argument that no live entertainment was provided and therefore the condition as to the doors was not necessary, is not the issue. The issue is that

appellant, on 11 occasions (10 occasions after being warned about the open doors), was in violation of condition 8.[5]

We conclude appellant was without proper authority in violating condition 8 over the period of three months as shown in the record.

II

Appellant contends that the penalty is excessive, arguing that the violations were caused by the negligence of only one man, and the condition has no great import in the scheme of public welfare and morals.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant argues that the person responsible for the violations was a "business partner" (a corporate officer, thus an employee [RT 19]), "who ran the business from day to day," usually in the evening hours [RT 23].

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morell v.

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[5]Appellant argues with no supportive evidence in the record, that neighboring nightclubs on either side of the appellant's premises are allowed to open their doors. This is an issue which should have been raised in the hearing before the Department, or by petition to modify the condition.

Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Appellant also argues that the condition violations were of no great import to public welfare and morals. We conclude quite the opposite.

The court in Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 113], defined the concept of public welfare and morals in a manner that adapts the definition to almost all factual matters and circumstances:

> "It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable."

The Boreta court, in footnote 22 at 2 Cal.3d 99, states:

> "We do not mean to intimate that the Department [Department of Alcoholic Beverage Control] is confined to considering violations of criminal statutes or departmental directives as grounds for suspension or revocation under section 24200, subdivision (a). It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules, as constituting activities contrary to public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject or prior department announcement."

Article XX, §22, of the California Constitution confers on the Department the exclusive power to revoke or suspend a license. The Department "need not define

by law or rule all the things that will put that license in jeopardy." (Cornell v. Reilly (1954) 127 Cal.App.2d 178 [273 P.2d 572, 577].) "Conduct constituting a violation of any of the sections of the Alcoholic Beverage Control Act is a ground for the suspension or revocation of a license." (H. D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749, 751; and Nelson v. Department of Alcoholic Beverage Control (1959) 166 Cal.App.2d 783, [333 P.2d 771, 773].)

CONCLUSION

Appellant essentially seeks to have the Appeals Board substitute its views for those of the Department which by law the Board can not do in this matter. The plight of appellant is not from any proven unfairness, or any arbitrary conduct by the Department, but from a faulty view of appellant's duties and responsibilities.

The decision of the Department is affirmed.[6]

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

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[6]This final decision 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 district 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.