ISSUED MARCH 10, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DAWN VANCE, Appellant/Protestant, v. AMIR T. and NAHED N. BARHOMA dba Mobil Mart 9859 Atlantic Avenue South Gate, California 90280, Respondents/Applicants, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6863 File: 20-308768 Reg: 96038454 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: January 7, 1998 Los Angeles, CA

Dawn Vance (protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which overruled her objection to the issuance of an off-sale beer and wine license to applicants Amir T. and Nahed N. Barhoma.

[1]The decision of the Department, dated May 1, 1997, is set forth in the appendix.

Appearances on appeal include appellant/protestant Dawn Vance, appearing through her counsel, Rick A. Blake; respondents/applicants Amir T. and Nahed N. Barhoma, appearing through their counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicants sought the issuance of an off-sale beer and wine license in connection with their proposed remodeling of an existing Mobil gas station and addition of a mini-mart. Protests against the application were filed by a number of nearby residents and others.

An administrative hearing was held on March 4, 1997, at which time oral and documentary evidence was received on the issue of whether issuance of the license would be contrary to public welfare and morals as set out in article XX, §22, of the California Constitution and Business and Professions Code §23958. Protestants claimed that issuance of the license would interfere with the operation of a nearby school and the quiet enjoyment of nearby residents, create a law enforcement problem for the City of South Gate, and result in an excess of licenses for the sale of alcoholic beverages in the immediate vicinity of the proposed premises [RT 8].

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision overruling the protests. His decision was adopted by the

Department, following which a timely notice of appeal was filed on behalf of protestant Dawn Vance.

In her appeal, protestant raises the following issues: (1) the applicants do not having proper zoning for the license; (2) the Department has failed to properly condition the license; and (3) the neighborhood park would be adversely affected.

DISCUSSION

I

Protestant contends that the applicants lack proper zoning for the location of the proposed licensed premises. Protestant argues that the conditional use permit granted by the City of South Gate was due to expire eleven months before the Department hearing on the application, and there was no evidence that it had been extended. This is important, protestant argues, because of Business and Professions Code §23790, which bars the issuance of a retail license in a city when the exercise of the rights and privileges under the license would be contrary to any valid zoning ordinance of any county or city.

Applicants assert that protestant has failed to show that there is a valid zoning ordinance in the City of South Gate. Applicants contend further that the conditional use permit does not automatically expire at the end of one year, but simply provides by its terms for a referral back to the city Planning Commission for a determination of whether it should be extended. Applicants also stress the fact

that the declaration of public convenience and necessity adopted by the City Council specifically acknowledged the earlier issuance of the conditional use permit.

The ALJ concluded that, while it appeared that the conditional use permit had not been exercised within the 12-month period, the city's declaration of public convenience and necessity, issued after the expiration of the one-year period, treated it as if it was still in effect. Protestant claims this finding stretches the rules of evidence.

We disagree. It is common knowledge that conditional use permits issued by municipal governments are frequently extended. While the record is silent as to whether there was or was not an extension in this case, the recognition by the city that a conditional use permit had been issued was an implicit part of the basis upon which the city based its declaration of public convenience and necessity. It is reasonable to infer that the conditional use permit continued to have viability.

This, of course, assumes that there is any merit to protestant's zoning ordinance argument. We are inclined to agree with applicants' contention that it is a false issue. There is nothing in the record to indicate any restrictions in any zoning ordinance, valid or otherwise, adopted by the City of South Gate or the county in which the city is located that relate to or restrict the sale of alcoholic beverages.

II

Protestant suggests that the Department's failure to impose upon the license a condition included by the City of South Gate in its declaration of public convenience and necessity in some manner impairs the Department's action. Protestant points to the condition in the declaration limiting the proportion of display space which may be devoted to alcoholic beverages, and the absence of such a limitation among the numerous conditions the Department did require.

Applicants argue that protestant has cited no authority for any requirement that the conditions imposed by the Department precisely mirror those imposed in a local grant of authority. Moreover, they point out, the absence of such a condition on their license does not excuse them from compliance with the city's limitation, so the issue is meaningless.

It is true that the Department's conditions are silent on the subject of the ratio of display of alcoholic beverages in relation to all other products offered for sale. However, the Appeals Board is unaware of any requirement that the Department impose precisely the same conditions that a city might choose to include in a conditional use permit. Further, it is doubtful the omission of such a condition will excuse the licensee from complying with it as contained in the conditional use permit. Either it is a valid and enforceable condition in the first instance, or it is not. The Department's imprimatur is not a precondition of its validity, nor does the city dictate the Department's conditions.

III

Protestant contends the Department's decision overlooked problems associated with alcoholic beverages encountered in South Gate Park, a large neighborhood park located approximately 360 feet from the proposed premises, and asserts that issuance of another license in the area will aggravate those problems. Protestant cites the testimony of Dorothea Mosby, the park's director, that, although alcohol is not allowed in the park by law, security officers regularly issue citations for alcohol in the park. In addition, people bring alcohol into the park in coolers, individual cans, or paper bags, consume it there, and create litter problems.

Protestant also asserts that it was Mosby's opinion that issuance of the license would aggravate the existing problem. Applicants dispute this, citing Mosby's disclaimer of any ability to form an opinion that alcohol sales at the proposed premises would cause alcohol-related problems in the park [RT 82], as well as her acknowledgment that she was not officially objecting to the issuance of the license [RT 79].

Applicants also contend that, even though there is no substantial evidence that the park would be adversely affected by issuance of the requested license, and even though the contention was not raised as a ground of protest, the Department's findings do, in fact, address the subject.

Applicants refer to Finding of Fact IV, which notes that the conditions

endorsed on the license were, by their terms, intended to alleviate potential interference with the park and a nearby church. Applicants also point out the ALJ's findings (Finding of Fact V) that Chiquita Walker, the Department investigator who handled the investigatory aspects of the Department's consideration of the license application, contacted park representatives and police officials and, based upon the absence of any protest or objection by them, concluded the conditional license would not interfere with the park's activities.

To the extent investigator Walker's testimony about the absence of any potential for an adverse impact upon the operation of the park conflicts with that of park director Mosby, the well-settled rule that it is the function of the ALJ to resolve conflicts in the testimony must govern.

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].)

Investigator Walker also took into account the fact that the park was separated from the proposed premises by a city block which contains a shopping center and a side street, as well as the fact that the license contained conditions designed to limit any interference with the park. The ALJ was entitled to rely on this testimony.

CONCLUSION

The decision of the Department is affirmed.[2]

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

Dissent of JOHN B. TSU follows:

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[2]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.

DISSENTING OPINION OF JOHN B. TSU

In California today, liquor stores, particularly bars, have become ubiquitous. Citizens of good conscience and good will often ask: "Is this good for the health of Californians?" The Department, therefore, in issuing a license, must give careful consideration to public health and public welfare.

The applicants in this instance are owners of a Mobil gas station who have applied for an off-sale beer and wine license. Protests against the application were filed by a number of nearby residents and others who contend the issuance of a license would be contrary to public welfare.

There is a school nearby, and a public park (South Gate Park) located approximately 350 feet from the proposed premises. Dorothea Mosby, the park's Director, testified that:

> Although alcohol is not allowed in the park by law, security officers regularly issue citations for alcohol in the park. In addition, people bring alcohol into the park in coolers, individual cans, or paper bags, consume it there and create litter problems ... "

California has many accidents caused by drinking drivers. The applicants in this case own a Mobil gas station. There is the risk that drivers who stop for gasoline will also purchase beer or wine and consume it while driving, thereby creating a dangerous risk of automobile accidents.

In view of the above facts and the existence of strong protests from nearby residents and others, I believe the issuance of the license would be contrary to public welfare and detrimental to the quiet enjoyment of nearby residents and park visitors. My conscience will not permit me to join my distinguished colleagues in their decision to affirm the Department's issuance of a license.

JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD