

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

JUAN F. VERGERA	)	AB-6951
dba 50/50 Sports Bar)	
5050-52 York Boulevard	)	File: 48-317006
Los Angeles, CA 90042,	)	Reg: 97039751
Appellant/Applicant,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
WILLIE L. WILLIAMS, et al.,)	
Respondents/Protestants,	)	Date and Place of the
	)	Appeals Board Hearing:
and	)	August 12, 1998
	)	Los Angeles, CA
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,)	
Respondent.)	

Juan F. Vergera, doing business as 50/50 Sports Bar (applicant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which sustained protests against, and denied, his application for a person to person, premises to premises, transfer and exchange of an on-sale general public eating place license for an on-sale general public premises license, on the ground the transfer and exchange would create or aggravate an existing crime problem in the vicinity of the proposed

¹ The decision of the Department, dated September 11, 1997, is set forth in the appendix.

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

Appearances on appeal include appellant Juan F. Vergera, appearing through his counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's application for the transfer and exchange of licenses, which would have resulted in the issuance of an on-sale general public premises license,² was the subject of protests by the Los Angeles Police Department, Los Angeles City Councilman Richard Allatore, and Patricia Velasquez, Principal of the Buchanan Street Elementary School. On April 17, 1997, the Department denied the application on several grounds, including appellant's disciplinary record with an on-sale beer license at another location, the detrimental effect on the nearby Buchanan Street Elementary School, aggravation of an existing law enforcement problem, and adverse effect upon residences within 100 feet of the proposed premises. Appellant petitioned for a hearing and one was held on June 30, 1997. The Department presented the testimony of six witnesses in support of its denial of the license, while applicant Vergara was the only witness who testified in favor of its issuance.

² The premises would operate as a sports bar, offering patrons billiards, video and arcade machines, and television viewing, with, of course, alcoholic beverages. The premises are not currently in operation. The structure housing the remodeled premises was previously licensed for the sale of alcoholic beverages for over 50 years [RT 26].

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which the Department adopted, sustaining the denial of the application, but only on the ground that its issuance would tend to create or aggravate an existing crime problem.

Appellant thereafter filed a timely notice of appeal, and contends that the Department's findings are not supported by substantial evidence, in that the police officers' opinion testimony upon which the Department relied was unreliable.

DISCUSSION

Appellant contends that the evidence does not support the Department's finding that issuance of the requested license would tend to create or aggravate an existing crime problem. Appellant argues that the testimony of the three police officers upon which the ALJ relied was speculative and conjectural, and, thus, unreliable.

The crime problem issue was the only one of the original grounds of denial and/or protest that survived the administrative hearing.³

The ALJ's (and the Department's, by virtue of its adoption of the proposed decision) reasoning with respect to the crime problem is stated as follows (Determination VII):

³ The ALJ made specific findings that appellant was not disqualified from holding a license because of his disciplinary history at another licensed location; that the normal operation of the business would not detrimentally affect the operation of a nearby school; that the transfer of the license would not interfere with the quiet enjoyment of their residences by nearby residents; and that there was no statutory or generic overconcentration of licenses in the area.

“... Of most concern is the increasing level of violent crime recently experienced in the neighborhood and the connection between that and both the rising level of gang activity and the availability of alcoholic beverages. Adding a business into the mix which has as its primary reason for being the sales of alcoholic beverages, is not consistent with public welfare or morals. Credible evidence established that York Boulevard in the immediate vicinity of the proposed premises is unsafe due to gang presence and the prospect of violence. It is unsafe for the public, not to mention passing school children. It does not make sense to open a new cocktail lounge in such an area, no matter how sports oriented it might be.”

These reasons, if supported by the evidence, are persuasive justification for denial of a license or license transfer.

The supporting evidence consists of the testimony and opinions of three police officers whose duties brought them in contact with the immediate area where the premises would be located.⁴ Their testimony is summarized in Finding of Fact XII.

Although to some extent the testimony of the police officers consisted of their “gut feelings” about gang activity and alcohol generally (admittedly so in the case of Sergeant John R. Ferguson, who had a two-and-one-half year tour of duty as officer in charge of vice for the area in question), it also reflected their actual day-to-day experience and exposure to the actual conditions of the area. To the extent their testimony included opinion testimony about the potential problems which might be associated with the operation of the premises, the weight to which it was entitled was for the trier of fact, and was not improper testimony such that it would be entitled to no weight whatsoever.

⁴ Department investigator Joe Chavez testified there was nothing in the Department’s file reflecting the fact that there have been any gang problems in any of the existing on-sale licensed premises on York Boulevard [RT 39].

Appellant argues that it is improper for the Department to rely on the police officers' testimony, since it was not supported by "statistical and hard evidence." Appellant reasons that since the Department is obligated by Business and Professions Code §23958 to "make a thorough investigation" to determine whether a license should be denied because its issuance might tend to create a law enforcement problem or result in an undue concentration of licenses, and since a "thorough investigation" necessarily includes consideration of statistical evidence, the testimony of a witness with respect to a potential law enforcement problem must also be supported by statistical information.

Appellant relies primarily on the decision in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (1981) 122 Cal.App.3d 549 [175 Cal.Rptr. 342], in which the appellate court affirmed an Appeals Board decision which said that the mere possibility of disturbances was an insufficient basis upon which to deny a license. That case is distinguishable. Here, police officers familiar with the area, from working there and, in the case of officer Jess Sanchez, living there, were able to testify credibly about the present existence of substantial gang activity in the area, the practice of gang members, especially the older members, of frequenting the establishments serving alcoholic beverages, and the potential impact of such activity on the area as a result of the addition of another establishment offering alcoholic beverages.

Appellant suggests that, because the predecessor operation had been in business for many years without encountering any problems, his would have a similar experience. However, little is known about the earlier business, and it is

probably safe to say that most of the time it operated was long before the gang problem had infected the area.

This case is more like Kirby v. Alcoholic Beverage Control Appeals Board (Schaeffer) (1972) 7 Ca.3d 433 [102 Cal.Rptr. 857], where the California Supreme Court held that the Department was entitled to rely upon competent opinion evidence in predicting the potential consequences flowing from the issuance of a license in an area which had recently experienced a large number of incidents of crime and violence. The court of appeal decision relied upon by appellant cites Kirby, and distinguishes it and other cases on the ground they involved “repeated and on-going criminal conduct of legitimate and substantial concern to law enforcement agencies, not a mere expectation that ‘disturbances would sometimes occur.’” [122 Cal.App.3d 549, 556-557, n. 6].

The appeals court (in the same footnote) also cited Parente v. State Board of Equalization (1934) 1 Cal.App.2d 238 [36 P.2d 437, 440] as sustaining a denial of a license where there was evidence of a long-standing, continuous police problem, that court referring to the “difficulty of controlling the lawless, the idle, the dissolute and the criminal element of a city tending to congregate at a designated place.” This colorful characterization of the police problem in Parente could also be used to describe the York Boulevard gang problem shown to be present in the case presently before the Board.

The testimony of the police witnesses, even without hard statistical backup, was sufficient, under the case law, to support the denial of the application. The Department cannot be required to grant a license simply because there are no

ready-made statistics to show what is shown just as persuasively and much more vividly by such testimony as that of officer Sanchez, who testified [RT 103] that he considers the problem so extreme, he wonders how people can be brave enough even to patronize the ATM machine in the vicinity of appellant's bar.

Testimonial evidence of the immediate presence of a pervasive gang problem in the area, and credible anecdotal evidence of the kinds of criminal activity encountered by the police as a consequence of such activity, can, and, in this case, do, adequately substitute for statistical evidence of actual criminal incidents.

CONCLUSION

The decision of the Department is affirmed.⁵

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

BEN DAVIDIAN, MEMBER, advised the Board he previously served as legal counsel to former Los Angeles Police Chief Willie Williams in an unrelated matter, and, for that reason, did not participate in the oral argument or decision in this matter.

⁵ 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.