ISSUED DECEMBER 21, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER Appellant/Protestant, v. MAI JASMINE CORPORATION dba California Beach 844 Hermosa Avenue Hermosa Beach, CA 90254 and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondents.	)	AB-7009a File: 41-332735 Reg: 98042753 Administrative Law Judge at the Dept. Hearing: Elise Manders Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA

James Lissner, (protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which overruled his protest against the issuance of an on-sale beer and wine public eating place license to respondent Mai Jasmine Corporation, operator of a restaurant in Hermosa Beach known as California Beach.

Appearances on appeal include appellant/protestant James Lissner; applicant, Mai Jasmine Corporation, appearing through its attorney, Robert E. Courtney; and

[1]The decision of the Department, dated February 4, 1999, is set forth in the appendix.

the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

This is the second appeal involving the application in question. In the first appeal, appellant sought to overturn the Department's issuance of an interim operating permit. The Appeals Board dismissed that appeal on the ground the Department's decision to issue an interim permit was not appealable. The present appeal is from the Department's decision to issue the license and overruling appellant's protest.

Appellant thereafter filed a timely notice of appeal and now raises the following issues: (1) the Department lacked jurisdiction to proceed with the application because the applicant failed to notify all residents within 500 feet of the proposed premises of the application; (2) the Administrative Law Judge failed to make a determination on the issue of public convenience or necessity; and (3) the definition of public convenience or necessity is unconstitutionally vague, deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law.

DISCUSSION

I

Appellant contends the applicant failed to comply with the requirement of Business and Professions Code §23985.5 that notice of the application be mailed to residents of real property within a 500-foot radius of the proposed premises,

and, as a result, the Department lacked jurisdiction to issue the license.

Section 23985.5 provides as follows:

> "Notwithstanding any other provision of this article, in any instance affecting the issuance of any retail license at a premises which is not currently licensed or for a different retail license, the department shall require that the applicant mail notification of the application to every resident of real property within a 500-foot radius of the premises for which the license is to be issued. The applicant shall submit proof of compliance to the department prior to license approval."

Appellant asserts that the Department investigator acknowledged that there were residents within 500 feet of the proposed premises who did not appear to have been given notice. Further, appellant claims he had presented evidence from the City Clerk of at least thirteen registered voters who lived within 500 feet of the proposed premises who had not been given notice.

In Nasr Masarweh (1994) AB-6494, the Appeals Board reversed and remanded to the Department for reconsideration a decision of the Department rendered pursuant to Government Code §11517, subdivision (c), in which the Department rejected the proposed decision which had recommended the issuance of a license. Among the Department's conclusions was one which found that issuance of the license would be contrary to public welfare and morals because the applicant had not properly notified each resident within a 500-foot radius of the proposed premises. The proposed decision had determined that, while some residents within the 500-foot radius had not received notice of the application, that fact was not sufficient to refute the testimony under oath of the applicant's manager that he had given the requisite notice.

The Appeals Board, acknowledging that the record evidence indicated there were residents who had not been given notice of the application, nevertheless

concluded that the statute does not provide any sanction for non-compliance. The Board stated:

> "The statute expressly states that the license shall not be issued until proof of compliance is filed with the department, a problematic statement. Compliance appears to be more of a ministerial act demanded by the statute for the unexpressed purpose of giving designated persons notification of the investigative process presumably to allow objections to the issuance, than a violation of the public welfare and morals as alleged in the determinations in the department's decisions."

Having said that, the Board, in a footnote, concluded that "since a license cannot be issued without a full compliance to the intent as well as the letter of the statute," the administrative hearing should have been continued until the Department was satisfied there had been compliance with the statute.

This brings us, then, to the crucial question. Does the evidence in this case show non-compliance?

Appellant Lissner, when pressed by the ALJ for evidence that there were residents who were not notified, admitted that "the only thing I have is that I have to take the investigator at her word that her list of addresses that she notified is it ... and the addresses that I found indicates who they weren't mailed to."

Appellant is apparently referring to a list of addresses furnished to him by the City Clerk, in a letter which purports to state the number of registered voters at each of those addresses. However, the letter itself states that its accuracy is questionable, since it relies upon information furnished by the county which the Clerk cannot verify because she has no access to the original records. In addition, according to the letter, the information it presents is almost a year old.

Because of these foundational deficiencies, we are forced to conclude that appellant's evidence is insufficient to justify our sending this case back to the Department for

further proceedings on the notice issue. Department counsel represented at the hearing that the Department was unaware of any residents who had not been provided notice. Given that appellant has raised the issue, it was incumbent upon him to provide competent evidence in support of his position, and he has not done so.[2]

II

Appellant contends the ALJ failed to make a determination on the issue of public convenience or necessity. The Department contends such a determination was unnecessary, since there has been no increase in the number of licenses within the census tract. The applicant was previously licensed and doing business in the same block, and the new license would simply replace a pre-existing license.

The Department is correct. The issuance of a new license in place of the pre-existing license results in the same number of licenses as before, and therefore does not create or add to an undue concentration of license in the census tract.

III

Appellant contends that the definition of public convenience or necessity is unconstitutionally vague, and deprives protestants of their right to notice. The Department contends that, since public convenience is not an issue, because the new license replaced an existing license, this contention is moot.

Once again the Department has the better position. Under Business and

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[2] Appellant failed to respond to a discovery request from the applicant regarding such information in appellant's possession which would indicate the identity of any resident who had not been notified. While we view this with disfavor, we are reluctant to say that such conduct would have warranted a refusal to hear appellant on the issue, if he could prove there actually were residents who were not notified.

Professions Code §23958.4, subdivisions (b)(1) and (2), a showing of public convenience or necessity as justification for the issuance of a license becomes necessary only where the issuance of the license would otherwise be barred because it added to or resulted in an undue concentration of licenses. Replacement of one license by another does neither. Therefore, the Board need not address the issue whether the definition of public convenience or necessity is unconstitutionally vague.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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 final 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.