

ISSUED JANUARY 6, 1999

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

MICHAEL N. and SAMIA OTAKY	)	AB-7027
dba Mike's Texaco)	
1955 North Rosemead Boulevard	)	File: 20-294379
South El Monte, CA 91733,	)	Reg: 94031439
Appellants/Applicants,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	October 7, 1998
	)	Los Angeles, CA
)	

Michael N. and Samia Otaky, doing business as Mike's Texaco (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which denied their application for an off-sale beer and wine license on the sole ground the premises are located in a moratorium city as defined in Business and Professions Code §23817.5, and only two of the three exceptions provided by Business and Professions Code §23817.7 were satisfied, the City of South El Monte not having

¹The decision of the Department, dated December 31, 1997, is set forth in the appendix.

determined that public convenience or necessity would be served by issuance of the license. The decision also overruled the protests of Antonio Camacho and fourteen other protestants, none of whom have appealed.²

Appearances on appeal include appellants Michael N. and Samia Otaky, appearing through their counsel, John William O'Donnell, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants operate a Texaco gasoline service station and mini-market located in the City of South El Monte. On March 25, 1994, appellants applied for

² Michael R. Montgomery, attorney for protestants at the administrative hearing, has filed a brief on their behalf with the Appeals Board entitled "Real Parties In Interest Response To Appellants' Opening Brief". In that brief, protestants contend that appellants are barred from raising the challenge to the statute on constitutional grounds, because appellants failed to raise that issue at the administrative hearing.

The brief also contains a brief summary of the grounds for protest that protestants raised at the administrative hearing, and contends that their protests should be granted based upon those grounds. Protestants raised a number of objections to the issuance of the license, contending that its issuance would: (1) result in too many licenses to sell alcoholic beverages in the immediate vicinity of the proposed premises; (2) create a law enforcement problem for the City of South El Monte; (3) interfere with the normal operation of a nearby park; (4) interfere with the quiet enjoyment of their property by nearby (including residences located within 100 feet of the premises) residents; (5) interfere with the operation of a nearby school; and (6) increase hazards in the area as to drinking and driving.

As persons affected by the final order of the Department, protestants were obligated to file any appeal within the time prescribed by statute. (Business and Professions Code §23081.) Their failure to appeal in timely fashion renders the issues raised in their protest moot. To the extent their brief addresses their contention that appellants are estopped from asserting a constitutional challenge to the statute in question, that portion of the brief will be considered as if filed by an amicus.

an off-sale beer and wine license for the premises. A number of protests were registered against the issuance of the license.

Prior to the commencement of the administrative hearing on the protests, the Department filed its "Second Amendment to Statement of Issues," adding as an issue to be decided, and as a ground for denial of the pending application, the question whether issuance of the license would be contrary to welfare and morals in that the premises is located in a city which has such a ratio of licenses to population as to come within the terms of Business and Professions Code §23817.5, subdivision (a), adopted by the Legislature during the pendency of the application. This statute imposed a moratorium on the issuance of off-sale beer and wine licenses for locations where on January 1, 1995, the number of issued off-sale beer and wine licenses exceeded one license for every 2500 inhabitants of the incorporated city where the premises sits. Section 23817.5 was amended in 1995, and a new section, §23817.7, was added, to be effective January 1, 1996, creating certain exceptions to the broad moratorium of §23817.5 as originally enacted. The City of El Monte was one of numerous cities in California which fell into the "moratorium city" category.

An administrative hearing was conducted on December 3, 1996, and August 12, 1997, focused on the objections raised by the protesters and on the question whether appellants were able to meet any of the exceptions created by the 1995 amendments to the statute, in accordance with the Department's amended statement of issues.

The protests were ultimately overruled by the Administrative Law Judge

(ALJ), and protestants have not appealed. (See fn. 2, supra.) The ALJ nevertheless denied the application, concluding that appellants could satisfy only two of the three conditions which would give rise to an exception to the bar created by the moratorium statute (Determination of Issues VIII):

“Grounds exist to deny the application because the premises is located in a moratorium city and only two of the three exceptions provided by Section 23817.7 were satisfied. (Finding of Fact ¶¶XV-XVIII.) The City of South El Monte has not determined that public convenience or necessity would be served by issuance of the license. Petitioners argue that the CUP which they obtained in early 1994 satisfies the requirement of Section 23817.7(3). The CUP does not satisfy and that argument is rejected. Nowhere in Exhibit I (roman) is the term public convenience or necessity even used. A conditional use permit is a land use determination while public convenience or necessity speaks to whether issuance of an alcoholic beverage license would satisfy some convenience or need in the area. Additionally, the requirement that the city determine whether public convenience or necessity would be served did not even exist in 1993/1994 when the petitioners applied for and received their CUP. That requirement only became effective January 1, 1995. To say that the El Monte City Council made a finding in March 1994 that it was not asked to make, was not required to make, and made no mention of, simply fails to withstand analysis.

“For this reason and this reason alone, issuance of the license sought would be contrary to public welfare and morals.”

Appellants have filed a timely appeal from the adverse decision of the Department, and now raise the following issues: (1) Business and Professions Code §23817.5 is unconstitutional by reason of its failure to specify factors for determining public convenience and necessity; (2) the Department of Alcoholic Beverage Control failed to perform its obligations under §23958.4; and (3) the CUP process satisfied the requirement of a determination of public convenience and necessity.

DISCUSSION

I

Appellants contend that Business and Professions Code §23817.7 fails to provide standards or definitions governing the local agency determination that public convenience and necessity would be served by issuance of the license sought by appellants, and that it fails to specify any process for such a determination. Without such standards, definitions, or specifications, appellants suggest, the statute is constitutionally defective.

The California Constitution, in article 3, §3.5, bars any administrative agency, which, of course, includes this Appeals Board, from declaring any act of the Legislature unconstitutional. We, therefore, decline to adopt appellants' suggestion.³

II

Appellants contend that the Department was obligated, pursuant to Business and Professions Code §23958.4, subdivision (b)(2), to notify the City of South El Monte of appellants' license application, so that it, the city, could make a determination whether public convenience or necessity would be served by issuance of a license, and, upon any failure of the city to act within 90 days, make its own such determination. According to appellants, the record reflects that no determination of public convenience was made by anybody, and is silent as to

³ We are inclined to think that appellants' constitutional objections are, in any event, premature. The record lacks any evidence that appellants ever requested the City of South El Monte to make any determination of public convenience or necessity. See text, *infra*, page 10.

when or whether the Department ever notified the City of South El Monte of the license application.

Business and Professions Code §23958 provides that the Department shall deny an application for a license if issuance of that license would result in or add to an “undue concentration” of licenses. Section 23958.4 sets forth criteria for determining “undue concentration,” and also sets forth conditions under which an alcoholic beverage license may be issued by the Department even though its issuance would otherwise result in or add to undue concentration. Applicants for certain types of licenses specified in subdivision (b)(1) need only satisfy the Department that public convenience or necessity would be served. The Department may issue any other type of license upon a determination made by the governing body of the area in which the licensed premises would be located, made within 90 days of the application for such license. If no such determination is made within that 90-day period, the Department may issue the license if the applicant shows the Department that public convenience or necessity would be served by its issuance.

The Department argues that §23958.4 has no application in this case. It contends that §23817.5, the “moratorium statute,” controls, because of its narrow application to off-sale beer and wine licenses, while §23958.4 applies broadly to all types of licenses.

Cases too numerous to cite hold that construction of a statute by an administrative agency charged with its enforcement is entitled to great weight unless clearly erroneous. (See, e.g., Pacific Legal Foundation v. California

Unemployment Insurance Appeals Board (1980) 29 Cal.3d 101, 111 [172 Cal.Rptr. 194].)

We agree with the position taken by the Department, but for different, or, at least, additional reasons.

The ability of the Department to issue a license that would result in or add to undue concentration under §23958.4 arises when a governing body has determined that issuance would serve public convenience or necessity, or the Department has so determined following the governing body's failure to make any determination within 90 days after notice of the license application. Thus, where there is either a positive determination by the governing body, or a positive finding by the Department after the required notice period and no action by the governing body, the Department may issue a license.

In contrast, under §§23817.5 and 23817.7, the applicant must persuade the Department that public convenience or necessity would be served by issuance of the license, and must obtain a determination from the local governing body to the same effect. Without a positive determination from the local governing body, the Department is powerless to issue the off-sale beer and wine license.

When initially enacted, §§23817.5 and 23817.7 were, by their terms, to remain in effect only until January 1, 1998, and as of that date repealed. In 1997, the legislature acted to make the moratorium a permanent addition to the Act.

Consequently, the burden remains on appellants to satisfy the requirements of the moratorium statute, and they have not done so.

III

Arguing that “there is no certitude that the City’s CUP process is unrelated to findings equivalent to ‘public convenience and/or necessity’” (App.Br., page 6), and listing a variety of regulatory and administrative situations where the concept is utilized, appellants again suggest that the absence of any definitive standards renders the statute constitutionally defective.

For the reasons stated at the outset of this discussion, we do not address the constitutional argument.

Nor can we accept appellants’ suggestion that, in the absence of any “certitude that the City’s CUP process is unrelated to findings equivalent to ‘public convenience and/or necessity,’” the issuance of a conditional use permit is an acceptable substitute for a determination of “public convenience or necessity” as it relates to the issuance of an alcoholic beverage license.

The resolution of the City of South El Monte City Council approving the issuance of a conditional use permit was adopted on March 24, 1994, prior to the January 1, 1995, effective date of §23817.5. The Council’s findings were focused on the compatibility of the proposed use with the land use element of the city’s general plan, and not on considerations of public convenience or necessity.

We agree with the ALJ’s observation that to say that the South El Monte City Council made a determination it was not asked to make, did not mention, and was not required to make, in response to what was yet to become law, does not withstand analysis.

Having said that, we would be remiss if we did not acknowledge that the

resolution did, in fact, contain a finding (Exhibit I, Section 7-C) which made specific reference to the fact that the store for which the permit was to be granted was expected to engage in the sale of beer and wine for consumption off the premises. The finding, however, related only to the compatibility of the proposed use with adjacent property, surrounding uses, the community in general, and the absence of any detriment to the public. It did not attempt to address the concept of public convenience or necessity or any of the criteria which might possibly be relevant or helpful in defining the concept.

It is clear from the record that appellants' problems flow from their inability, as a result of a change in the political winds in the City of South El Monte, to obtain a favorable determination on the issue of public convenience or necessity. In the absence of such a determination, the Department's hands are tied.

ORDER

The decision of the Department is affirmed.⁴

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

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this matter.

⁴ 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 order as provided by §23090.7 of said code.

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