ISSUED JUNE 1, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FAIRFIELD BOWL BAR & RESTAURANT COMPANY dba Fairfield Bowl 2030 North Texas Street Fairfield, CA 94533, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7212 File: 47/48-22262 Reg: 97038870 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: March 16, 2000 San Francisco, CA

Fairfield Bowl Bar & Restaurant Company, doing business as Fairfield Bowl (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license, with revocation stayed for two years, and suspended the license for 45 days, for appellant permitting the premises to be used as a disorderly house and in a manner which created a law enforcement problem,

[1]The decision of the Department, dated July 30, 1998, is set forth in the appendix.

being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§24200, subdivision (a), and 25601.

Appearances on appeal include appellant Fairfield Bowl Bar & Restaurant Company, appearing through its counsel, Dale L. Allen, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license and on-sale general public premises license were issued on April 12, 1985. Thereafter, the Department instituted a two-count accusation against appellant: Count 1, which included 22 subcounts, charged the keeping of a disorderly house in violation of Business and Professions Code[2] §25601; and Count 2, which re-alleged the 22 subcounts of Count 1 and included 65 additional subcounts, charged the creation of a law enforcement problem, a violation of §24200, subdivision (a).

An administrative hearing was held on May 12, 13, 14, and 15, and October 8, 9, 10, and 14, 1997, at which time oral and documentary evidence was received, and testimony was presented concerning the incidents alleged in the accusation.

Subsequent to the hearing, the Department issued its decision which determined that 12 subcounts of Count 1 and 53 subcounts of Count 2 were

[2] All statutory references herein are to the Business and Professions Code unless otherwise indicated.

proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department proceeded in excess of its jurisdiction; (2) the Department did not proceed in the manner provided by law; and (3) the decision is not supported by the findings and the findings are not supported by substantial evidence. The first two issues will be discussed together, since appellant's arguments on those issues overlap.

DISCUSSION

I

Appellant contends that, since the Department's "purpose . . . is to promote temperance and safety of the people and nothing more," the Department exceeded its jurisdiction by disciplining appellant when appellant had "eliminated whatever alleged problem may have previously existed . . . eight months prior to the filing of the accusation and there was no evidence at the administrative hearing of any problems up through and including the hearing." (App. Opening Br. at 2.) Appellant contends that its elimination of the problems before the accusation was filed also means the Department's imposition of discipline violates appellant's due process rights, since there is no longer any need to "protect" the public. According to appellant, its due process rights were also violated by the Department's ten-month delay in proceeding against it, by which time appellant had corrected any problems.

All of these arguments are premised on appellant's "cure" of the problems at

the premises before the accusation was filed. Appellant does not deny or contest any of the violations found by the Department decision, but appears to argue that it cannot be disciplined for violations that occurred in the past which no longer occur, since (appellant contends) the Department can only impose discipline to protect the public welfare and morals from presently existing violations.

The Department's disciplinary actions are not for the purpose of punishment, but to protect the welfare and morals of the public and to ensure compliance by licensees. Following appellant's reasoning, licensees could commit violations with impunity, as long as there was no existing violation at the time an accusation was filed or a hearing was held. Such a practice would neither protect the public welfare and morals nor ensure licensees' compliance.

Walsh v. Kirby (1974) 13 Cal.3d 95, on which appellant relies for several of the above propositions, is not relevant to the present case. Walsh involved the Department's cumulation of violations of the Fair Trade Statues before bringing an accusation, where fines increased progressively as the number of violations increased. The situation here is not comparable.

II

Appellant argues that the decision is not supported by the findings and the findings are not supported by substantial evidence because the unlawful acts that occurred “have nothing to do with the liquor license” and the evidence did not show that appellant permitted the unlawful acts to occur, but that the premises is located in a high crime area where unlawful acts occurred regardless of appellant’s

efforts at the licensed premises. Appellant points out that during the time covered by the accusation, there were no arrests for narcotics sales, no arrests in prostitution stings conducted by police at the premises, and no incidents of selling alcohol to minors, and that it took reasonable steps to prevent unlawful activity.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as here, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Appellant does not dispute the findings of the ALJ that 12 subcounts of Count 1 and 53 subcounts of Count 2 were proved. Rather, appellant attempts to distinguish the incidents involving the “dance club” from those related to the bowling center, arguing that it was the dancing, not the sales of alcoholic beverages, that led to the problems and, therefore, the liquor license should not be subject to discipline. Although many of the incidents may have occurred while

appellant held a dance permit, they all occurred on appellant's licensed premises or the surrounding parking lots under appellant's possession and control. The incidents establishing the existence of a disorderly house and a law enforcement problem included assaults, fights, near-riots, and several instances of public intoxication. Clearly, these incidents are related, either directly or indirectly, to appellant's use of its alcoholic beverage license.

The court in Laube v. Stroh (1992) 2 Cal.App. 4th 364, 379 [2 Cal.Rptr. 2d 779], said in regard to a licensee "permitting" unlawful activity:

> "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

Appellant knew, or should have known, of the existence or likelihood of incidents such as the fights and public intoxication that occurred. These types of incidents are often associated with premises that serve alcoholic beverages, and appellant's premises had additional risk factors such as large numbers of patrons and the location of the premises in an area of high crime. Once appellant knew of an incident occurring, its failure to prevent further problems justified a finding that it permitted the violations occurring thereafter.

Appellant points out that the premises is in an area of high crime, arguing that the problems would have occurred regardless of what appellant did in the

premises. The court in Yu v. Alcoholic Beverage Control Appeals Board (1992) 3 Cal.App. 4th 286, 295 [4 Cal.Rptr. 2d 280] addressed this contention, quoting Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App. 2d 106, 119-120 [28 Cal.Rptr. 74], saying:

> "The cases reject the argument that the licensee is in a high crime area and can't control the situation, because it proves too much. If location alone prevented revocation, 'the license of offending premises in a notorious neighborhood could not be suspended or revoked unless [the] Department clearly demonstrated that the establishment was a worse offender than its competitors. Conceivably under such a policy, concerted action on the part of a number or licensees to harbor the drunken patron would render all immune from discipline under the umbrella of the resultant "area" conditions.'"

While it is true that certain types of unlawful activity did not occur at appellant's licensed premises, it was found that other unlawful activity meriting discipline did occur. The absence of some types of violations does not negate the existence of other types.

Appellant argues that, once it knew of the unlawful activity, it was only required to take reasonably diligent steps to prevent unlawful behavior, not to insure that no unlawful behavior occurred on the premises. Appellant misinterprets Laube, supra: reasonable diligence is sufficient to deal with "reasonably possible unlawful activity"; however, once the licensee knows of such activity, the failure to prevent further occurrences constitutes "permitting" the problem.

Appellant also misreads Laube when it cites that case for the proposition that, in order to be held responsible for unlawful activity, "[t]he licensee must somehow be at fault in causing the various incidents recited by the ABC." No

support for that statement is found on the page cited (376) or on any other page in Laube. The court in Laube rejected the concept of strict liability or "liability without fault" in the context of charging a licensee "with 'permitting' something whenever he has not taken action to prevent it, even when the licensee had no reason to know there was something that required prevention." (2 Cal.App.4th at 373.) The court clearly did not contemplate a requirement that a licensee "must somehow be at fault in causing" unlawful behavior in order to be held accountable for such behavior. The Department is charged with protecting the public welfare, and "[a]s in applying the law of nuisance, fault is not relevant; the power of the Department derives from the police power, to prevent nuisances regardless of anyone's fault in creating them. Thus it is said that the licensee is charged with preventing his premises from becoming a nuisance and it will not avail him to plead that he cannot do so." (Yu v. Alcoholic Beverage Control Appeals Board, supra, 3 Cal.App.4th at 296, citing Givens v. Dept. Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

The teaching of the Laube and Yu cases together is that, although a licensee cannot be held to have permitted unlawful behavior unless he or she knows, or has reason to know, of such behavior in the premises, if conditions exist that are injurious to the public welfare and the licensee knows or has reason to know of the existence of the condition, the licensee may be disciplined for failure to prevent a nuisance, even though the injurious conditions were not created through the fault of the licensee. In the present case, whether or not the disorderly house and the

law enforcement problem were caused by some fault of appellant, appellant knew of the existence of the conditions and by not preventing them, permitted them. The Department did not abuse its discretion in imposing discipline under these circumstances.

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].) While the penalty imposed is substantial, we cannot say that it is so unreasonable and arbitrary as to be an abuse of the Department's discretion.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.