ISSUED NOVEMBER 5, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NAJWA MAIDA, LUIS QUEVEDO and ROBERT CLARK HUNTER Appellants/Protestants, v. MOHAMMED MEHDI HUMKAR dba Sam's Market & Deli 703 Wendy Drive Newbury Park, CA 91320, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondents.	)	AB-7290 File: 21-335284 Reg: 98043494 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA

Najwa Maida and Luis Quevedo (protestants) appeal from a decision of the Department of Alcoholic Beverage Control[1] which overruled their protests against the issuance of an off-sale general license to Mohammed Mehdi Humkar, doing business as Sam's Market & Deli. Appellants were among several protestants against the issuance of the license, but are the only protestants who have perfected an appeal.[2]

[1] A copy of the Department's decision, dated November 19, 1998, is set forth in the Appendix.

[2] Robert Clark Hunter's name appears in the caption because he also filed a notice of appeal from the Department's decision. However, Hunter's protest had been deemed abandoned by the Administrative Law Judge because of Hunter's

FACTS AND PROCEDURAL HISTORY

In October 1997, appellant filed an application for the issuance of an off-sale general license for premises located at 703 Wendy Drive, Newbury Park, California. Applicant has held an off-sale beer and wine license for the same premises for four years. The premises are located in the end unit in a multi-business shopping center located in a mixed commercial/residential area. The business operation consists of a large convenience market-delicatessen combination. The business offers fresh meat, fresh fruit, and an array of grocery items, as well as a soda fountain. The only difference between the current operation and the proposed operation would be the applicant's ability to sell distilled spirits for consumption off the premises.

Appellant proposed that the license be issued with several conditions imposed upon it, intended to address possible concerns of nearby residents. These included limitations upon hours during which alcoholic beverages could be sold;[3] a requirement that graffiti be removed or painted over within 48 hours of its having been applied and that the area under applicant's control being kept free of litter; a prohibition against coin-operated video games; a prohibition against the consumption of alcoholic beverages on any property adjacent to the licensed premises and under appellant's

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failure to appear at the hearing. Hunter's failure to file a brief or appear before the Appeals Board at the hearing set to determine whether he was entitled to appeal resulted in the dismissal of his appeal. The caption remains the same to facilitate reference and avoid confusion.

The only brief which has been filed on behalf of a protestant is that filed by the attorneys for Jose E. Avaringa and Najwa Maida. Luis Quevedo filed a notice of appeal but has not filed a brief. Avaringa is not an appellant.

[3] 7:00 a.m. to 10:00 p.m., Sunday through Thursday, and 7:00 a.m. to 11:00 p.m. Friday and Saturday.

control; and a requirement that the rear door remain closed at all times during the operation of the premises.[4]

Nine timely protests were filed against the issuance of the license. Only four of those nine protestants appeared at the administrative hearing which was held after the Department's initial denial of the application. Four witnesses, including two of the protestants, testified against the issuance of the license. In addition, the Department licensing investigator testified about his investigation and recommendation.

The administrative hearing centered on three issues: the potential interference operation of the premises might cause with the quiet enjoyment of four residences located within 100 feet of the proposed/existing premises, in what the statement of issues (Exhibit 2) described as a predominantly residential neighborhood; law enforcement concerns; and overconcentration of licenses.[5]

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[4] All but two these conditions are also in the existing license [RT 35].

[5] Although appellants' brief contends that the applicant did not provide notice to residents located within 500 feet of the proposed premises, as required by Business and Professions Code §23985.5, that was not one of the issues framed at the hearing as having been raised by the protests (see RT 8-9).

Appellants argue that had such notice been given, additional protests might have been filed. They say they were prevented from raising this issue at the hearing because Peter Watson, permitted to testify as a witness and not as a protestant, was not allowed to testify on the subject.

The only evidence that would suggest the requisite notice was not given was Watson's testimony that neither he nor his wife received such a notice, and his hearsay assertion that he had been told others had not been given notice. That the Watsons may or may not have received such notice does not support a conclusion that no one else received such notice. There is no competent evidence that any other resident within 500 feet was not furnished notice of the application. Two residents complained of not having been given notice. Neither appeared at the hearing. That their written protests were timely filed demonstrates that they had become aware of the application in some fashion.

Finally, there has been no claim by the Department that the notice requirement was not satisfied, and the protests which were filed resulted in all

Occupants of two of the four residences within 100 feet of the proposed premises testified at the administrative hearing (Peter Watson and Sharon Pennock). Muriel Pearson and appellant Najwa Maida also testified in opposition to the application. Applicant Mohammed Humkar was the sole witness in support of the application.

Department investigator Morris Berniard testified that he contacted the occupants of three of the four residences situated within 100 feet of the proposed premises, but was unable to contact the fourth until after he had completed his investigation [RT 21]. Berniard testified that he visited the area of the premises several times, including one nighttime visit. While the noise at night was not unusual, when he visited in the daytime he heard freight trucks idling in the parking lot, and the slamming of freight doors and car doors. He described one occasion when noise generated by a beer truck and a soda truck reached a level he characterized as excessive. However, he associated this instance with the existing operation, and did not believe issuance of the license would result in any increase in the noise level [RT 23].

Berniard reported receiving complaints from two residents about persons jumping a fence and taking a short cut across their property. This reportedly occurred three years earlier, and was not connected to the premises [RT 48, 49].[6] Others he

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materially relevant issues being raised.

[6] Berniard said that one of the neighbors (Pennock) complained of children from the area jumping over her fence to get to Verna Avenue [RT 55]. There is nothing to indicate these incidents were associated with the operation of the premises. Another resident, Mr. Franklin, also registered non-specific complaints with Berniard about noise and people jumping over the wall separating Franklin's property and the premises [RT 57-58].

interviewed complained that the business sold to minors[7], and was a detriment to children in the area. He further testified that he spoke to Deputy Tumbleson of the Ventura County Sheriff's Department and was advised the area was not posted as a law enforcement problem and was not a high crime area. In his own visits to the area, he did not observe any problems associated with the sale and consumption of alcoholic beverages [31-32].

He concluded, on the basis of his investigation, that residents within 100 feet of the premises would be impacted by the operation of the premises, particularly with reference to noise [RT 32, 33].

With respect to other issues, Bernaird testified that he calculated the number of licenses permitted according to the area census, and concluded there was no overconcentration [RT 29]. He also concluded there would be no law enforcement problem, based upon past history and his conversation with Deputy Tumbleson of the Ventura County Sheriff's Department, the law enforcement agency responsible for patrolling the area where the premises are located.

On cross-examination, Berniard reiterated his concerns about noise generated in connection with the operation of the premises, the greatest of which, as the administrative law judge appears to have concluded, being that from delivery trucks parking adjacent to the concrete wall separating the residences from the parking lot.

Berniard also acknowledged that Wendy Drive is the main thoroughfare through

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[7] Berniard checked the Department's files and found that the applicant had one prior violation for a sale to a minor which occurred in 1997 [RT 26-27]. He also consulted Deputy Tumbleson about any potential impact of the business upon minors, and was told of 59 calls over the past five years, most of which were false alarms [RT 27].

Newbury Park - “a very major thoroughfare and there is a lot of traffic” [RT 40] - and that during each of his visits to the area, traffic on Wendy Drive was heavy and loud. Also, traffic on Highway 101 would generate noise, especially at night when noise carries farther [RT 39-40]. As noted earlier, nighttime noise from the premises was not excessive [RT 42]. While Berniard felt that daytime noise from truck engines and doors slamming was excessive, he was able only to relate two such instances, one involving a beer truck, the other a soft drink truck, to the operation of the premises.

Peter Watson, one of the residents living within 100 feet of the premises, registered complaints about noise caused by trucks servicing the premises and driving through the parking lot. His complaints were directed for the most part at the use of the south door, the door closest to his property. Watson also complained about littering, consumption in the parking lot, and urination in public.[8]

Sharon Pennock also testified about noise generated by motor homes and other vehicles parked along the wall, their motors running, and doors slamming, while the occupants of those vehicles patronized the premises. She thought there would be more noise if the license was granted, because more patrons would be attracted. She was unaware of any necessary connection between people jumping the wall and the sale of alcoholic beverages, and acknowledged that she has had to tell her own daughter many times not to jump the wall [RT 101].

On cross-examination, Pennock said she had possibly seen motor homes parked along the wall on two or three occasions, and had heard yelling possibly ten

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[8] Based upon the ALJ’s description of Watson’s testimony, it would seem that he discounted substantially Watson’s complaints about subjects other than noise. As the judge of credibility, that was within the ALJ’s right.

times. She agreed Wendy Drive was noisy, a main thoroughfare, with trucks, buses and cars going by all hours of the day [RT 106].

Muriel Pearson testified that she believed issuance of the license would have a negative impact on the neighborhood; she felt there already were enough licensed sellers of alcoholic beverages [RT 111]. She lives "a couple hundred feet away" but has heard no noise from the premises [RT 112].

Protestant Najwa Maida testified briefly. The import of her testimony was that she moved to Newbury Park from Lancaster, hoping to get her family away from an area where "they have liquor licenses on each corner" [RT 114].

Mohammed Humkar, the applicant, testified that, other than the one instance of a sale to a minor, and the false alarms, he has had no other reason to require police attention. His deliveries are between 8:00 a.m. and 2:00 p.m.; none are after 6:00 p.m. He applied for the license to upgrade his business, and because his customers have asked him to do so. He declared his intention to operate the premises responsibly, and there is no evidence that would indicate the contrary.

Humkar identified petitions signed by a substantial number of his customers supporting his application, and a series of photographs depicting his business and the surrounding area. Humkar works in the store and has employees as well. He testified that although he lives elsewhere, he cares about the area around his store.

Following the conclusion of the hearing, the ALJ issued his proposed decision, which the Department adopted, which concluded that operation of applicant's business with only the conditions contained in the existing petition for conditional license (Appendix A) would likely interfere with the quiet enjoyment of residents within 100 feet of the premises. Thus, grounds existed for denial of the application. Although he did

not expressly set forth his reasoning, it is apparent that the ALJ's principal concern was the noise generated by trucks and other vehicles parking or driving along the wall separating the premises from the residences. (See Findings VII and VIII.) This can also be inferred from the balance of the proposed decision, which provided that if appellant would agree to the addition of another condition expressly directed at the south door, access to which invites the traffic which appears to generate the bulk of the noise complained of, the license could issue. The new condition would require the closure of the south door except in cases of emergency. It could not be used for patron ingress or egress or acceptance of deliveries, and could not be solely a screen or ventilated door. This would seem to be to eliminate noise from patrons who might otherwise seek to park south of the premises and enter from the south door, as well as to limit interior noise from escaping toward the residences. Since deliveries through the south door are also prohibited, delivery trucks would be less likely to park along that portion of the premises.

Appellants have filed a timely notice of appeal, and now raise the following issues: (1) the premises and parking lot are within 100 feet of a residence and interfere with the residents' quiet enjoyment of their properties; and (2) applicant failed to notify residents within 500 feet of the premises that an application had been filed.

DISCUSSION

Appellants contend the decision is in error because the premises and parking lot are located within 100 feet of residents and would interfere with the residents' quiet enjoyment of their properties. Specifically, appellants contend the decision is not consistent with the evidence.

Appellants' principal objection to the decision appears to be to its apparent

assumption that, by foreclosing use of the south door of the premises, noise along the wall separating the premises from the residence will be minimized. Appellants claim this is not supported by any evidence. (See App.Br., Page 3.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[9]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, 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

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[9]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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].)

The United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471 [100 S.Ct. 2286, 2295-2296]. See also Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440] and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

The Alcoholic Beverage Control Act authorizes the Department to make and prescribe reasonable rules to carry out the purposes of the act. Rule 61.4 is one of the rules promulgated by the Department pursuant to this authorization. It provides, in substance, that no license shall issue where the premises or the parking lot of the premises is within 100 feet of a residence. However, the rule also provides that the Department may issue a license where the applicant is able to demonstrate that the operation of the business will not interfere with the quiet enjoyment of their property by residents.

The purpose of Rule 61.4 is consistent with that concern. By shifting to appellant the burden of establishing that issuance of a license will not interfere with the quiet enjoyment of nearby residents, it requires the Department to pay careful

heed to protests registered by those affected.

But, by the same token, an applicant who is able to demonstrate the absence of any materially adverse impact upon those nearby residents is entitled to the license he or she has sought, assuming there are no other barriers to its issuance ,and, in such circumstances, the Department's decision to grant a license is well within its discretion.

Applicant has consented to the imposition of a number of conditions on the license he seeks, designed to control the operation of the business in a manner which would protect residential quiet enjoyment. These conditions include limitations on the hours during which alcoholic beverages may be sold, and the prohibition of coin-operated games or video machines, the presence of which might otherwise attract children and produce loitering. They also would require the applicant to control litter and graffiti, and prohibit consumption on property under his control adjacent to the premises.

The evidence established that the premises are located in an area where there is already a substantial amount of noise generated by street traffic, particularly on Wendy Drive. Although appellants claim that Wendy Drive is not a major thoroughfare (App.Br., page 2), the testimony of Sharon Pennock, one of the residents, refutes that claim.

In addition, applicant's business is not the only business in the immediate area, so it would not be appropriate to hold it responsible for all traffic-related noise.

The ALJ's assumption that the major noise problem was associated with traffic along the wall south of the premises is not unreasonable in light of all the testimony. Several of the witnesses testified about engines idling and doors slamming, and vehicles driving along the wall.

The complaints about delivery truck noise indicated that such problems were sporadic and infrequent. In any event, even if the application is denied, the deliveries would be unlikely to change, since beer and soft drinks would still be sold at the premises, and there would be nothing to discourage continued use of the south door of the premises.

The most significant finding of the ALJ to emerge from the evidence is Finding IX, to the effect that there already is noise, mostly from traffic, near the proposed premises, that only a small part of it is attributable to the existing premises; that the addition of the ability to sell distilled spirits will have little, if any, effect on existing noise levels; that the disturbance experienced by neighbors is more from on-sale premises nearby; and that investigator Berniard noticed no alcoholic beverage litter, loitering or consumption in the vicinity of the premises during his visits to the premises.

The closure of the south door, the door closest to the residences, may result in a reduction of noise levels on that side of the premises. At a minimum, it should not cause an increase. We think it an appropriate step by the ALJ.

In Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489 [30 Cal. Rptr. 219, 222-223], the court, in remarks pertinent here, stated:

> "In determining whether facts established by substantial evidence constitute good cause for concluding that issuance of a license will not be contrary to welfare and morals, the Department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject. If the decision reached is without reason under the evidence, the action of the department is arbitrary; constitutes an abuse of discretion; and may be set aside. Where the decision is the subject of choice within reason, the department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the Appeals Board or the court may not interfere therewith."

The Department must, and does, take a broader view than any single protestant, and must draw upon its expertise when determining what may flow from the issuance of a license. Here appellant satisfied it that the issuance of the license would not interfere with the quiet enjoyment by neighbors of their residences, and we are satisfied there was substantial evidence for it to make that determination.

ORDER

The decision of the Department is affirmed.[10]

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

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[10] 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.