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

AB-7397

JEFFREY P. DACK, AICP
Director of Planning, City of Marina
Appellant/Protestant

v.

CALIFORNIA STATE UNIVERSITY MONTEREY BAY FOUNDATION,
dba Black Box Cabaret,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 41-338513 Reg: 98044239

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: September 21, 2000
San Francisco, CA

ISSUED JANUARY 17, 2001

Jeffrey P. Dack, AICP, as Director of Planning for the City of Marina (protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied his protest against the issuance of an on-sale beer and wine public eating place license to California State University Monterey Bay Foundation (applicant).

Appearances on appeal include protestant Jeffrey P. Dack, appearing through counsel for the City of Marina ("the City"), Robert R. Wellington; applicant California State University Monterey Bay Foundation ("the Foundation") appearing through California State University (CSU) counsel Bruce M. Richardson; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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[1]The decision of the Department, dated April 8, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On December 31, 1997, the Foundation applied for the subject license for the Black Box Cabaret ("the Cabaret"), which it operates on the campus of CSU-Monterey Bay. The Cabaret is within the city limits of Marina, although about two miles from the main part of the City. The City protested the application, contending that the Foundation was required to obtain a use permit from the City before the Department could issue an alcoholic beverage license.

An administrative hearing was held on January 14, 1999. Testimony was presented by Department investigator David L. Raymond, who investigated the Foundation's application and prepared a report ("the investigator's report"), which was introduced into evidence as Exhibit 2. Jeffrey Dack, the Director of Planning for the City of Marina, testified regarding the zoning ordinance that the City contends is applicable to the Foundation. Sheri Damon, deputy county counsel for Monterey County, testified regarding the county's support of the City's position. Kevin Saunders, who oversees the Black Box Cabaret operations, testified about the origin, operation, and use of the facility.

Subsequent to the hearing, the Department issued its decision which denied the protest and ordered the issuance of the license.

The City has filed the present appeal, contending that 1) if the Foundation is a state agency, it cannot hold an alcoholic beverage license; 2) if the Foundation is not a state agency, it can hold a liquor license only if it complies with the City's zoning regulation; and 3) no evidence supports the findings and the determination that the sale of wine and beer by the Black Box Cabaret was in furtherance of an educational

purpose or an intrinsic or essential element to the admittedly educational function of the Black Box Cabaret. The first two contentions will be discussed together.

DISCUSSION

I

The City argues that the Foundation cannot hold an alcoholic beverage license if it is a state agency, and if it is not a state agency, it is not exempt from the local zoning laws and must get a city permit before an alcoholic beverage license can be issued to it. The Foundation, in its brief to this Board, states that, as an auxiliary organization of CSU, it is a "nonstate" entity, legally separate from, but operationally integral with the university campus, and governed under Education Code §89900 et seq. The City leaps upon this statement and declares that this "admission" by the Foundation resolves the matter, because the Foundation cannot come within the protection of the state's sovereign immunity if it is not a state agency or entity. We disagree with the conclusion of the City.

The Foundation is correct that it is not a state agency. Under Wanee v. Board of Directors (1976) 56 Cal.App.3d 644 [128 Cal.Rptr. 526], and several California Attorney General's opinions (see e.g.,64 Ops.Cal.Atty.Gen. 118; 47 Ops.Cal.Atty.Gen. 8), the Foundation is considered an entity separate from the university. It is not a state agency, but a non-profit corporation that is integrally related to the university, providing many functions essential to campus operations. (See 5 Cal.Code Regs. §42500.) However, the City's argument that the Foundation cannot partake of the State's exemption from local zoning laws if it is not a state agency, is, in our view, clearly incorrect.

Agents and even, in some circumstances, lessees of state agencies are considered to be clothed with same immunity as the state agencies they work for or lease from. (See, e.g., In re Means, 14 Cal.2d 254 [93 P.2d 105] (state employee working on state structure in a city need not meet the requirements of a city charter provision); Hall v. City of Taft (1956) 47 Cal.2d 177 [302 P.2d 574] (city's attempt to enforce building ordinances against building contractor working on school building for school district rejected by court); 68 Ops.Cal.Atty.Gen. 114 (lessee of Cal Expo property exempt from local building and zoning regulation if use of property furthers conducting of state fair, other than merely raising revenue; if development solely for private purposes of developer, local ordinances would apply).) The Foundation is clearly an agent of CSU and thus protected from local regulation to the extent that CSU would be.

II

Because we have concluded that the Foundation, as an agent of CSU, is clothed with the same immunity as would be CSU, we consider whether that immunity is available in the present circumstances. The City has raised this issue in its assertion that there is no substantial evidence to support the Department's findings and the findings do not support the evidence.

The City contends that the Foundation must comply with the City's zoning requirements before the Department can issue it an alcoholic beverage license. The City's contention is based on Business and Professions Code §23790 which provides, in pertinent part:

> "No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city. . . ."

This statute is a specific exception to the State's exclusive jurisdiction, exercised throught the Department, over "the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the state." (Cal.Const., art XX, §22; Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal.App.4th 376, 385 [28 Cal.Rptr. 2d 530].) There is no dispute that, pursuant to §23790, license applicants, unless otherwise exempt, must comply with valid local zoning ordinances before the Department may issue a license. The City contends that the Foundation is not exempt and must, therefore, obtain a use permit from the City before the Department may issue a license to the Foundation. It argues that the State's sovereign immunity applies only when the State is engaged in a governmental, rather than a proprietary function. (See Board of Trustees v. City of Los Angeles (1975) 49 Cal.App.3d 45, 49 [122 Cal.Rptr. 361].)

The governmental function of CSU, the City contends, is education, and it can only be exempt from local regulation when it is engaged in educational or research-related activities. The Department decision accepted the City's statement of the issue to be determined, and concluded that "evidence establishes that the operation of the Black Box Cabaret is in furtherance of the educational purpose of the Applicant, California State University Monterey Bay Foundation" (Det. of Issues IV), and "[p]ursuant to Determination of Issues Nos. III and IV, issuance of the license to [the Foundation] would not be contrary to public and morals." (Det. of Issues V.)

The City concedes that operation of the Cabaret has an educational purpose, but argues there was no evidence presented to support the conclusion that the selling of alcoholic beverages in the Cabaret was also in furtherance of that purpose. It states that "[t]he sale of beer and wine cannot and should not be, and is not in this case, in furtherance of the educational purpose of CSUMB or its Foundation." (Prot. Opening Br. at 5.)

The Foundation contends that there was substantial evidence presented to support the findings of the Department and the determinations were supported by those findings. It asserts that it is wholly within the power granted to the CSU Board of Trustees "to make the determination of what is appropriate to and part of a modern university campus" and "[t]he City's jurisdiction over these matters is as nonexistent as its jurisdiction over the shape of the University's curriculum." (Foundation's Reply Br. at 3, 4.) It also argues that the City presented absolutely no evidence that contradicted the Department's determination, so all the evidence presented supported that determination.

In a case such as this, where the appellant contends that the decision of the Department is not supported by substantial evidence, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is limited to determining whether, in light of the whole record, the findings of fact made by the Department are supported by substantial evidence, even if contradicted (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]), and whether the Department's decision is supported by the findings.

"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].) In reviewing the evidence, the Board is conducting an appellate review, which 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 testimony by Kevin Saunders, who oversees the Cabaret operations, established that the Cabaret was started as a coffeehouse in 1996 by a student group which, under the direction of a faculty member, developed a business plan and operated the facility. [RT 61.] It is the continuing responsibility of students to figure out how the Cabaret should operate. [RT 64.] This is in accord with the academic program at the university, which emphasizes using and demonstrating knowledge rather than simply taking courses. The Cabaret has progressed based on graded student projects. The application for the alcoholic beverage license arose out of a thesis-type project by a group of students, who did marketing surveys, financial analyses, and research that laid the groundwork for the application. [RT 68.]

The Teledramatic Arts and Technology Department uses the Cabaret as a "learning lab," where they can perform some of their class projects, such as folkloric dance and other productions. Weekly during the school year, the Cabaret

hosts an opportunity for students, faculty, and staff to meet informally with the President of the university. Various student bands perform at the Cabaret, and the Students with Disabilities group brought in a rock group made up of musicians in wheelchairs. The campus multi-cultural group put on an ethnic fashion show at the Cabaret, and students perform "everything from poetry readings to rap" at an "open mike" night. [RT 61-62.] Saunders testified that the serving of beer and wine under the interim license appears to have increased the use of the Cabaret as a social gathering place and a place for students to interact with faculty and staff. [RT 72-73.]

The Cabaret is open from 7 a.m. to 10 p.m. on most weekdays and until midnight on some Thursday and Friday nights. It is not open on weekends or when school is not in session. [RT 63.] The Cabaret is not intended to be a revenue-producing facility, but a social outlet and a learning lab. [RT 70.]

No other evidence was presented regarding the operation of the Cabaret. The uncontradicted testimony of Saunders is substantial evidence supporting the ALJ's conclusion, and this Board is not entitled to re-evaluate and re-weigh the evidence presented. Under the legal standard propounded by the City, that is, whether the activity was related to the educational function of the university, the finding of the ALJ, based on substantial evidence, requires that we affirm the decision of the Department.

Affirmance of the Department's decision is also indicated by other factors not discussed by the parties. First, we do not find the case relied on by the City,

Board of Trustees v. City of Los Angeles (1975) 49 Cal.App.3d [122 Cal.Rptr. 361], to be particularly persuasive of the result urged by the City. In that case, the activity that the court found to be proprietary, or unrelated to the university's mission, was the university's lease to a circus of undeveloped off-campus land held by the university. The university did not sponsor the circus in any way or argue that it was provided for the educational benefit of the students; the leasing was simply done to produce revenue. In contrast to the present appeal, that case does not appear to be one where the activity could even arguably be related to the university's educational mission.

A second factor is the virtually plenary power of the CSU Board of Trustees to manage and develop the property of the university. The ALJ noted this in Finding VI, although he did not discuss it as a basis for his decision. We believe that, even if the sale of beer and wine at the Cabaret might arguably be a "non-educationally related" activity, the power vested in the Board of Trustees calls for much the same deference that this Board is required to give to the exercise of discretion of the Department; that is, where reasonable minds could differ, the determination of the Board of Trustees regarding what is within the scope of the university's educational mission ought to control.

The third factor influencing this Board is what we perceive as the rather questionable status of the requirement that the university, as a state entity, must be engaged in a governmental activity rather than a proprietary one in order to be exempt from local zoning regulations. Government Code §53091 requires "local

agencies" of the state to "comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated." Government Code §53090 provides that "local agency" does not include the state, a city, a county, or various other specific districts. These provisions, enacted in 1959, have been interpreted as specifically exempting from local regulation the state and the other enumerated entities, whether the function they are performing is governmental or proprietary. (40 Ops.Cal.Atty.Gen. 243; 68 Ops.Cal.Atty.Gen. 114; see also Akins v. County of Sonoma (1967) 67 Cal.2d 185.) While this particular issue does not appear to have been specifically addressed by a court since the passage of Government Code §§53090 and 53091, it is certainly possible that a court would now hold the governmental-versus-proprietary distinction relied upon by the City no longer valid.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.