

ISSUED JULY 14, 2000

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

| | | |
|----------------------------------|---|--------------------------|
| URSULA KELLY and JOSEPH P. SHEA |) | AB-7455 |
| Appellants/Protestants, |) | |
| |) | File: 21-347716 |
| v. |) | Reg: 99045863 |
| |) | |
| LUCKY STORES, INC. - DELAWARE |) | Administrative Law Judge |
| dba Sav-On # 3457 |) | at the Dept. Hearing: |
| 1747-69 North Cahuenga Boulevard |) | John P. McCarthy |
| Los Angeles, CA 90028 |) | |
| Respondent/Applicant, and |) | Date and Place of the |
| |) | Appeals Board Hearing: |
| DEPARTMENT OF ALCOHOLIC |) | June 6, 2000 |
| BEVERAGE CONTROL, |) | Los Angeles, CA |
| Respondent. |) | |
| |) | |

Ursula Kelly¹ and Joseph P. Shea, (protestants), appeal from a decision of the Department of Alcoholic Beverage Control² which overruled their protests and granted the premises to premises transfer of an off-sale general license to Lucky Stores, Inc. - Delaware, doing business as Sav-On # 3457 (applicant), provided applicant consents to the imposition of additional conditions on the license when

¹The first name of co-protestant Ursula Kelly is misspelled in most documents and pleadings in this matter.

²The decision of the Department, dated July 22, 1999, is set forth in the appendix.

issued.

Appearances on appeal include appellants and protestants Ursula Kelly and Joseph P. Shea; applicant Lucky Stores, Inc. - Delaware, dba Sav-On # 3457, appearing through its counsel, Richard Warren; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicant filed for the transfer of a license at another location on October 14, 1998. The Department undertook an investigation of that application, during which protests were filed against the issuance of the applied-for license.

An administrative hearing was held on May 11, 1999, at which time oral and documentary evidence was received. Seven protestants were represented at the hearing. The issues raised were the closeness of residents, creation of law enforcement problems, and undue concentration of licenses in the area. Subsequent to the hearing, the Department issued its decision which determined that the protests should be overruled and the license would issue if applicant consented to additional conditions on the license. Two protestants thereafter filed a timely notice of appeal.

In their appeal, they raise the following issues: (1) operation of the premises will interfere with residential quiet enjoyment, (2) operation will create or aggravate a law enforcement problem, and (3) there is an undue concentration of licenses in the area.

DISCUSSION

The Department of Alcoholic Beverage Control is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license. The Department must reasonably determine for "good cause" that the granting of such license would not be contrary to public welfare or morals.

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.³

In the Appeals Board's review, certain criteria are used by the Board in evaluating a decision of the Department: where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102

³The 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].

Cal.Rptr. 857] (a case where the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Where conflicts in the evidence arise, a question of credibility of the witnesses becomes a question. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

I

Protestants contend that operation of the premises will interfere with residential quiet enjoyment. Will Salao, a Department investigator, testified that there were 11 residential structures within 100 feet of the proposed premises [RT 38, 53].⁴

The Alcoholic Beverage Control Act sets forth the proposition that the Department may make and prescribe reasonable rules as are necessary to carry out the purposes of the Act (Business and Professions Code §25750). One of the rules

⁴The record does not indicate the number of residents, however, apparently all parties agree that these structures are residential.

promulgated by the Department is 4 California Code of Regulations, §61.4 (Rule 61.4), which reads in pertinent part:

“No ... premises-to-premises transfer of a retail license shall be approved for premises at which either of the following conditions exist[s]: ... (a) The premises are located within 100 feet of a residence”

Quiet enjoyment of their property by the citizenry appears to command the focused attention of the state. The rule above quoted mandates that no license is to be issued where a residence is located within 100 feet of the proposed licensed premises.

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, 65 L.Ed.2d 263].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440, 49 L.Ed.2d 310], and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857], the Supreme Court said "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the

opinions of experts." Although the case was not a rule 61.4 case (the closest residence was about 150 feet away), the Kirby court upheld the Department's determination that issuance of the license sought therein would, inter alia, interfere with nearby residential quiet enjoyment even though no nearby resident had voiced opposition to the license. The court took note of substantial evidence on both sides of the issue and concluded that the expert witness testimony of the county sheriff was sufficient to support the department's crucial findings. It appears that the Kirby issue of substantial evidence on both sides of the conflict, applies to the present appeal.

The Board over the years has visited the extremely restrictive requirements of Rule 61.4. The Board in Davidson v. Night Town, Inc. (1992) AB-6154, stated: "In rule 61.4, the department prohibits itself, as it were, from issuing a retail license if a residence is within 100 feet of a proposed premises"

The Board in Ahn v. Notricia (1993) AB-6281, stated: "This rule [Rule 61.4] concerns prospective interference or noninterference with nearby residents' quiet enjoyment of their property ... Apparently rule 61.4 is based on an implied presumption that a retail alcoholic operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment."

In the case of Graham (1998) AB-6936, the Board cited many cases concerning quiet enjoyment and its supreme importance to the extent "that rule

61.4 is nearly absolute.”⁵

Notwithstanding the restrictive wording of the rule, the rule sets forth a procedure whereby the Department may issue a license even though the rule is applicable: “Notwithstanding the provisions of this rule, the department may issue an original retail license ... where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the [their] property by residents.”

The area apparently has problems over time and to a lesser degree at the present time, has had problems with transients, drunkenness, and crime [RT 70, 72-75, 82, 85, 89, 97-100, 102, 110-111].

The balance between the upgrading of the area through commercial enterprises, such as this Sav-On drug store, and the fear of residents about the impact of another alcoholic beverage outlet, appears to be a norm in areas where people live, but demand the services of commercial enterprises.

The Department has imposed 18 conditions on the license and concludes that these conditions, along with the control of the premises parking lot by security, along with the daily influx of people into the store, would tend to reduce the area problems rather than increase them.

⁵Citing Kassab (1997) AB-6688; Hyun v. Vanco Trading, Inc. (1997) AB-6620; Hennessey’s Tavern, Inc. (1997) AB-6605; Lopez & Moss (1996) AB-6578; Alsoul (1996) AB-6543, a matter where the Appeals Board raised the rule on its own motion; J.D.B., Inc. (1996) AB-6512; Park (1995) AB-6495; Esparza (1995) AB-6483; and Saing Investments, Inc. (1995) AB-6461.

The Department has determined that the issuance of the license with the conditions will not interfere with residential quiet enjoyment by nearby residents. The Department has broad powers of discretion in circumstances such as these. We find no arbitrariness in the exercise of the Department's discretion. We must leave this final conclusion to the expertise of the Department.

II

Protestants contend that operation will create or aggravate a law enforcement problem.

The decision of the Department determined that the protestants had not carried their burden in showing that the issuance of the license would create, or aggravate an existing, law enforcement problem [Findings IX, XIII, and XIV, and Determination of Issues I].

While there was testimony by protestants as to drunkenness, discarded alcoholic beverage containers, and transients that move about in the area, the determination of police, and the area organizations which had done much to reduce crime and errant behavior in the area, presented a picture of an area which would be revitalized by enterprises such as applicant's, and the flow of customers within the immediate area.

Protestant Kelly describes the area around the premises in a very graphic manner, describing gangs congregating, daily public drunkenness along with its attendant conduct - public urination, etc., loitering, and crime. Protestant Shea also

described the same scenes, in a very business-like manner, as he is involved in organizations that attempt to control, if not clean up, the area [Findings XI and XII].

On the other hand, the police seem not to be concerned with the addition of the new license, and various organizations appear to have made headway in efforts to control the area [Findings VIII, IX, XII, XIII, and XIV].

When one considers the area and the descriptions of the problems, along with the conditions imposed [Finding IV], the impact of organizations and the police in reducing crime and control of the area, the impact of a new enhancement to the area in the form of a large drug store, this appeal could be argued either way. Enhancement of a depressed area has many times been shown to curb the problems by creating a place where people want to go and shop, thus forcing the undesirables from the area.

Since reasonable minds may disagree as to the ultimate outcome of the venture, it appears to the Board that it must defer to the experience of the Department, police, and even protestant Shea who concedes that the new addition to the area could have beneficial effect.

III

Protestants contend, and the record so shows, that there is an undue concentration of licenses in the area [Finding VI, Legal Basis For Decision II, and Determination of Issues II-B].

However, the decision of the Department determined that public convenience

or necessity will be served by issuance of the license [Finding VIII and Determination of Issues II-D]. Business and Professions Code §23958.4 states that the Department may issue a license even if there is an undue concentration of licenses if a local governing body of the area in which the proposed premises is to be located determines issuance would serve public convenience or necessity.

The Los Angeles City Council on September 16, 1998, adopted a resolution that issuance of the license would serve public convenience or necessity [Exhibit B].

With that resolution made in conformity to statute, the Department has determined that the license should issue. The record is such that the decision of the Department is not arbitrary, or an abuse of the Department's discretion. Therefore, we must defer to the discretion accorded the Department.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.