ISSUED NOVEMBER 27, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SALIM R. RAWDAH dba Cedars Mid Eastern Lebanese Cuisine 2943 East Broadway Long Beach, CA 90803, Appellant/Applicant, v. RENE M. CASTRO, et al., Respondents/Protestants, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7527 File: 41-348758 Reg: 99045958 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

Salim R. Rawdah, doing business as Cedars Mid-Eastern Lebanese Cuisine (applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which sustained certain protests against the issuance of, and denied his application for, an on-sale beer and wine public eating place license.

[1]The decision of the Department, dated November 10, 1999, is set forth in the appendix.

Appearances on appeal include appellant Salim M. Rawdah, appearing through his counsel, Benjamin Wasserman; protestants Rene M. Castro and Elizabeth Kuehne, appearing through their counsel, John E. Romundstad; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's petition for the issuance, with conditions, of an on-sale beer and wine public eating place license was filed on March 4, 1999. The petition recited, among other things, that issuance of the applied-for license without the conditions set forth therein would interfere with the quiet enjoyment of the property of nearby residents and constitute grounds for denial of the application under the provisions of Rule 61.4 of Chapter 1, Title 4 of the California Code of Regulations.[2] At some point during the pendency of the petition, an interim license was issued to appellant.

Protests were filed by Rene Castro and Elizabeth Kuehne, asserting as grounds for denial of the application the existence of overconcentration of licenses; parking, littering and noise concerns; and concerns about crime.

An administrative hearing was held on September 17, 1999, at which time

---

[2] The four conditions limited the hours during which alcoholic beverages could be sold or consumed; provided that entertainment or noise not be audible from the exterior of the premises in any direction; provided that the rear door remain closed at all times, except in the case of emergencies or for accepting deliveries; and required that the premises be kept free of litter.

oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Brandy Morita concerning her investigation of the application and her recommendation that the license issue; by Elizabeth Kuehne, one of the protestants; and by the applicant.

Subsequent to the hearing, the Department issued its decision which sustained the protests in part, overruled the protests in part, concluded that appellant had failed to sustain his burden under Rule 61.4, and determined that issuance of the license would be contrary to welfare and morals in that the normal operation of the premises would interfere with the quiet enjoyment of nearby residents, in violation of Rule 61.4. The decision found that during the operation of the premises pursuant to an interim operating permit, appellant violated the conditions which provided that entertainment and noise not be audible beyond the premises, as well as the condition requiring the rear door to remain closed at all times except during emergencies or deliveries.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the Department's order is improper because: (1) appellant has not interfered with the quiet enjoyment by nearby residents of their property; (2) there was no evidence that nearby residents were disturbed; and (3) the Department lacked good cause to deny the application. These contentions all relate to the basic question presented by this appeal, which is whether appellant satisfied his burden under Rule 61.4, and will be addressed together.

DISCUSSION

As just noted, the basic issue presented by this appeal is whether appellant

has satisfied his burden under Rule 61.4. The Department concluded that he failed to do so.

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 such rule promulgated by the Department is Rule 61.4 (4 Cal.Code Regs. §61.4), which reads, in pertinent part:

> "No original issuance of a retail license or premises to premises transfer of a retail license shall be approved for premises at which either of the following conditions exist:
>
> (a) The premises are located within 100 feet of a residence.
>
> (b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. ..."

Over the years, the Board has visited the extremely restrictive requirements of Rule 61.4 on numerous occasions. In Davidson v. Night Town, Inc. (1992) AB-6154, the Board 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. ..." In Ahn v. Notricia (1993) AB-6281, the Board said:

> "This rule [Rule61.4] concerns prospective interference or non-interference with nearby residents' quiet enjoyment of their property. ... Apparently rule 61.4 is based upon an implied presumption that a retail alcohol operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment."

In Graham (1998) AB-6936, the Board, referring to numerous cases invoking the rule, described the rule as "nearly absolute."

Of course, the rule is not absolute, since it permits the issuance of a license

even though there may be residences within 100 feet if, and only if, the applicant "establishes that the operation of the business will not interfere with the quiet enjoyment of their property by residents." Thus, once the proximity between residence and business is shown to be less than 100 feet or less, the burden shifts to the applicant to demonstrate that the operation of the business will not interfere with residential quiet enjoyment.

The Department determined that appellant had violated two of the conditions attached to his interim operating permit - that entertainment and noise not be audible beyond the premises, and that the rear door remain closed at all times except for emergencies or deliveries. The Department's findings were based upon the testimony of protestant Kuehne that the music accompanying the entertainment - a belly dancer - could be heard through the open windows and open rear door of the premises, and her testimony that she observed the rear door to the premises open during periods where there was no emergency or delivery occurring.

The key Findings of Fact are Nos. 8, 9, and 10:

> "8. Protestant Kuehne resides approximately 400 feet northeast of the premises, while Protestant Castro resides approximately 280 feet northeast thereof.
>
> "The evidence established that there are nine residences located within 100 feet of the subject premises. The closest residence is 48 feet from the premises, structure to structure, and is seven feet from the premises off-street parking lot. These residences are northeast and northwest of the premises.
>
> "Except for Protestant Kuehne, the undersigned did not have the benefit of testimony of any other nearby residents with respect to any of the disturbances associated with the operation of the subject premises. Mrs. Kuehne provided testimonial evidence that on occasion when visiting friends close-by the premises, she is disturbed by 'belly dancer' music emanating

from inside the premises. Friends and neighbors close-by the premises have advised Mrs. Kuehne of similar disturbances on other occasions.

"The evidence established that this music was part of the entertainment the applicant provided his patrons by CD player. This evidence established a violation of the conditions attached to the temporary license issued to the Applicant pending the resolution of the herein application matter. (See Findings of fact No. 1, Condition 2.)

"9. Protestant Kuehne also introduced photographic evidence of a violation of Findings of Fact No. 1, Condition 3, with respect to keeping the rear door to the premises closed at all times. The evidence is clear that Applicant purposely kept the rear door open in violation of the condition, because it was inconvenient to keep it closed due to the frequent deliveries to the premises and the need of his employee to frequently obtain cleaning supplies in a nearby storage room.

"The Applicant's response when queried concerning this violation was that he would petition the Department to remove the condition as soon as possible.

"10. This response evinces a lack of understanding on the part of the Applicant of the basic legal requirements designed to protect the public from the harmful effects of a licensee's operation. The applicant's violation of the proposed conditions on the temporary license does not bode well under this state of the evidence for the nearby residents should a permanent license issue.

"In total, the evidence established that the Applicant is required to satisfy the requirements under Rule 61.4 that the operation of his business would not interfere with the quiet enjoyment of their property by nearby residents. He did not carry this burden by reason of the violations set forth in Findings of Fact Nos. 8 and 9, committed under the temporary license issued by the Department."

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. It is well-established that, 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.[3]

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 Cal.Rptr. 857]; 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].)

Appellant's challenge to the Department's order would have the Board make its own determination on the issue of residential interference, solely on the basis of appellant's assertion that no residents within 100 feet of the premises were disturbed. There are several reasons why appellant's position must be rejected.

First, the absence of any evidence of disturbance of nearby residents, assuming, contrary to the findings, that to be the case, is of no consequence. It is the threat that there could be such a disturbance that is the burden appellant has failed to overcome. Indeed, appellant's own conduct is the strongest evidence that such a threat exists. His belief that it is simply a matter of asking the Department to remove the door condition demonstrates both an inability to appreciate the

---

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

purpose of the conditions - to control noise - and a real risk that he would not honor them in the future.

Nor is there any force to appellant's argument that, because no resident who resides within 100 feet protested the application, and both protestants lived farther than 100 feet from the premises, Rule 61.4 does not apply. The test is whether appellant has demonstrated that residents within 100 feet would not be disturbed. It is irrelevant that no such resident appeared as an actual protestant. It is the function of Rule 61.4 to protect such residents.

We are satisfied that the Department correctly determined that appellant failed to carry his burden under Rule 61.4, and properly denied the application.

ORDER

The decision of the Department is affirmed.[4]

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

---

[4] 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.