ISSUED MARCH 1, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SUMMIT ENERGY CORPORATION CALIFORNIA dba Arco AM/PM 903 Ventura Street Fillmore, CA 93015, Appellant/Applicant, v. JUANA ERAZO, et al., Protestants/Respondents, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7585 File: 20-348208 Reg: 99047322 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: November 3, 2000 Los Angeles, CA

This is an appeal by Summit Energy Corporation California, doing business as Arco AM/PM, from a decision of the Department[1] which sustained protests against, and denied appellant's application for, a person to person, premises to premises transfer of an off-sale beer and wine license for a proposed gas station and

[1] The decision of the Department, dated January 20, 2000, is set forth in the appendix.

convenience market to be located in a mixed commercial-residential area in Fillmore, California.

Appearances on appeal include appellant, appearing through its counsel, Joshua Kaplan; protestants Consuelo Garcia, Delfino A. Garcia, Blanca Rosa Garcia, and Paul D. Glanville, appearing through their counsel, Archie Clarizio; Juana G. Erazo and Dora Lopez, representing themselves; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant applied to the Department for a person to person, premises to premises transfer of an off-sale beer and wine license for a proposed premises located in a mixed commercial-residential area of the City of Fillmore. Following an investigation by the Department, and the filing of protests by nearby residents, the application was denied. Thereafter, applicant petitioned for a hearing on its application, pursuant to Business and Professions Code §§24011 and 24012.

The Department issued a notice of hearing which stated, among other things, that the issues to be determined at the hearing would be whether the granting of the license would be contrary to public welfare and morals by reason of article XX, §22 of the California Constitution, §23001 of the Alcoholic Beverage Control Act (Business and Professions Code §23001), and Rule 61.4 of the Department. In an attachment to the notice, the Department set forth five specific issues as the basis for its denial of the application:

"A. The ... [residences in question are] located within 100 feet of the applied-for premises and/or the closest edge to the parking lot to be operated in conjunction with the premises and the normal operation of the proposed premises would interfere with the quiet enjoyment of the residential property of the area; to wit:

"1. The following residences are within 100 feet of the applied for premises: [Five residences are listed, two of which abut the premises, two of which are 40 feet from the premises, and one of which is 70 feet from the premises.]

"2. The late night and early morning noises from the premises, patrons, or their cars would interfere with the sleep of the residents.

"3. There will be increased traffic.

"4. Lights from the premises will disturb the residents.

"5. Beer runs may occur and individuals may jump into the yards of residents in an attempt to get away."

The issues represented various concerns and objections registered by the protestants.

The hearing took place on December 9, 1999, following which the Department entered its order denying the petition and sustaining the protests of protestants Garcia, Glanville, Erazo and Lopez.

Of the issues addressed in the decision,[2] the decision concluded in the affirmative only with respect to the first - whether normal operation of the premises would interfere with the quiet enjoyment of their property by nearby residents. In

[2] The Statement of Issues set forth five issues; the decision addressed a total of seven. It concluded that a letter of convenience and necessity from the City of Fillmore eliminated any undue concentration problem; that it was not established that the business would create a traffic or loitering problem, interfere with the operation of a nearby nursing home, or increase the incidence of driving while intoxicated; nor was it established that Business and Professions Code §§ 23817.5 and 23817.7 applied, since the application was for a transfer.

so doing, it treated Findings III and XI as controlling the result, stating (in Determination of Issues III):

> "Even though Petitioner has accepted the numerous conditions required by the City of Fillmore in order to obtain its conditional use permit and although Petitioner feels that these conditions will help to alleviate the concerns of the nearby residents, the Petitioner has not met the requirements of the rule stated above [Rule 61.4] by reason of Findings III and XI in light of the fact that two of the residences which are located within 100 feet of the premises actually abut the property of the proposed premises."

Appellant has filed a timely appeal, and now contends that the decision is not supported by its findings and the findings are not supported by substantial evidence. Appellant asserts that the Department failed to conduct "a legal balancing test concerning interference with 'quiet enjoyment'."

DISCUSSION

Appellant contends that the findings do not support the decision, nor are they supported by substantial evidence.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would 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]

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 contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

"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]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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].)

Testimony was presented by six residents (Blanca Ortiz, Paul Glanville, Delfino Garcia, Doral Lopez, Juana Erazo, and David Coert), at least three of whom reside within 100 feet of the proposed premises. All expressed concerns over the

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[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].

potential for increased traffic and noise, loitering and littering, lighting, possible beer runs, dangers to children, and other fallout from the prospective operation of the business. The fact that the business directly abutted two of the properties was indicated to be a major concern, and the actual or proposed construction of walls to separate the premises from the residences appeared only to aggravate the protestants' concerns.

Appellant did not include with its application any proposed conditions to be imposed upon any license which might issue. The subject of conditions was called to appellant's attention by the Administrative Law Judge (ALJ), with the suggestion that, if appellant were to propose certain of the conditions which had been imposed upon its conditional use permit from the City of Fillmore,[4] "it may or may not make a difference."

In response to the ALJ's suggestion, Martin Zaldo, a vice-president of appellant, testified that appellant would agree to those conditions relating specifically to sales of beer and wine, or would accept all 134 of the conditions on the conditional use permit. Eleven of the 134 conditions appear to relate directly to sales of alcoholic beverages:

> "113. No alcohol (distilled spirits) or beer and wine is permitted to be consumed on site.
>
> "114. There shall be no more than 5% of retail floor area of the structure utilized for the sale of alcoholic beverages per Zoning Ordinance Section 6.04.0615.3.A.3.

[4] A copy of the conditional use permit, with the conditions, is attached to Exhibit 4.

"115. No beer or wine shall be displayed within five feet of the cash register or front door unless it is in a permanently affixed cooler.

"116. No display of beer or wine shall be made from an ice tub.

"117. No beer or wine advertising shall be located on motor fuel islands and no self-illuminated advertising for beer or wine shall be located on buildings or windows of establishments where motor vehicle fuels are sold or stored.

"118. Alcoholic beverages shall be sold only between the hours of 8:00 a.m. and 12 midnight on each day of the week.

"119. Signage shall be posted on the property prohibiting consumption of alcoholic beverages on the property and prohibiting loitering.

"120. Signage shall be posted within the liquor section of the subject supermarket notifying the public in both English and Spanish that it is a violation of the California State Vehicle Code to transport open containers of alcoholic beverages within the passenger compartment of a motor vehicle.

"121. Exterior advertising on the subject property indicating the availability of alcoholic beverages is prohibited.

"122. Employees on duty between the hours of 10:00 p.m. and 12 midnight must be at least 21 years of age to sell beer and wine.

"127. Alcoholic beverages and non-alcoholic beverages shall be stocked and displayed in separate areas of the store."

While it is true, as Department counsel pointed out, that some of these conditions merely recite what is already the law, it is also true that some of them go farther in their restrictions. For example, condition 118 restricts appellant's hours of operation to fewer than permitted by law, and condition 121 limits appellant's ability to advertise that it sells alcoholic beverages.

Appellant also identified a number of other of the conditional use permit conditions that it would accept on a conditional license, addressing such subjects

as restricted lighting,[5] an obligation to keep the northerly portion of the property clean, and a ban on storage of vehicles and storage structures,[6] pay phones,[7] noise,[8] trash enclosures,[9] landscaping,[10] litter,[11] and graffiti.[12]

The decision of the Department fails to address what, if any, effect these conditions, or any of them, would have in ameliorating any possible adverse impact of the nearby residences. Indeed, the decision seems to invoke Rule 61.4 as an absolute:

> "Even though the Petitioner has accepted the numerous conditions required by the City of Fillmore in order to obtain its conditional use permit and although the Petitioner feels that these conditions will help to alleviate the concerns of the nearby residents, the Petitioner has not met the requirement of the rule stated above by reason of Findings III and XI in light of the fact that two of the residences which are located within 100 feet of the premises actually abut the property of the proposed premises."

Department Rule 61.4 provides, 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:

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[5] CUP conditions 94, 95, 111.

[6] CUP condition 99.

[7] CUP conditions 101, 102.

[8] CUP conditions 108, 109.

[9] CUP condition 109.

[10] CUP condition 128.

[11] CUP condition 109.

[12] CUP condition 130.

> (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.
> ...
>
> Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to-premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents."

Rule 61.4 effectively imposes upon an applicant for a retail license, where the premises are within 100 feet of a residence, the burden of proving non-interference with residential quiet enjoyment. It follows, then, that it was appellant's burden to satisfy the trier of fact - the ALJ - that the operation of its business would not interfere with the quiet enjoyment of the property by residents.

The rule simply shifts the burden of proof on the question of interference to the appellant. It does not, contrary to what the decision seems to suggest, create an absolute barrier to the issuance of a license, or deprive the Department of the discretion it has with respect to the issuance or denial of a license.

The Appeals Board knows from having reviewed many cases implicating Rule 61.4 that the Department frequently approves the issuance of a license even though the premises may be within 100 feet, or closer, to a residence or residences. In so doing, the Department ordinarily reviews conditions included with the applicant's petition, and sometimes engrafts additional conditions which, if accepted by an applicant, result in the overruling of protests.

The Department has a broad discretion with respect to the issuance or denial

of a license. As stated in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489 [30 Cal.Rptr. 219, 222-223]:

> "[T]he 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 is reached 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."

But, as the language in Koss makes clear, that discretion must be the product of reason. In this case, we think the Department acted arbitrarily.

Despite the attention devoted in the course of the hearing to the potential importance of conditions which might be imposed upon the license (see RT 45-46, 130-134, 138-139), the decision pays only lip service to their existence. It makes no attempt to address the important question whether, individually or in total the CUP conditions would or should alleviate the concerns of the nearby residents about potential problems flowing from the operation of the business, and particularly those attributable to the sale of alcoholic beverages.[13]

Department counsel argued at the close of the hearing (RT 156-157):

> "This place is not yet built. This is a situation which happens a lot. It would be a lot easier to evaluate an ongoing premises than it is for one that hasn't been opened.
>
> "There is some degree of speculation in all this testimony, but case law is

[13] The business will operate with or without the sale of alcoholic beverages. The building will be illuminated, cars will enter and leave, and customers will patronize the proposed food facilities.

> clear that speculation, as long as it is reasonable and based upon foreseeable events, is proper, given the fact that we have a business which is not up and operating yet.
>
> "What we are dealing with here is a license which, if it is issued, would have no conditions on it. You have heard a lot of testimony on the conditions of the CUP. I have two problems with that.
>
> "First, ABC cannot do any enforcement based off of conditions on CUP's. If there were conditions which attached to this license, the ABC license, that would be a different story.
>
> "Maybe our conclusion would have been different, but that would have required an investigation of those conditions, and we don't have anything like that here."

Department counsel concluded his remarks with his recommendation that the license be denied, stating (RT 157-158):

> "To the extent we are dealing with the issues as they relate to the 61.4 residents, the noise, the traffic and the loitering, before the Department could - as I indicated before, the Department does not believe that this license should issue without any conditions.
>
> "And at this point, I am not in a position to pass judgment dealing with conditions on those issues because we haven't had a chance to evaluate such conditions, other than in a broad, general sense to insure we comply with the requirement of Rule 61.4."

The Department must, and should, 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. If a Rule 61.4 protestant's objection is treated as a veto, then any application for a license which could be granted with appropriate conditions would die stillborn.

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, the burden shifts to the applicant to demonstrate that the operation of the business will not interfere with residential quiet enjoyment.

We cannot tell from the decision whether, had the ALJ analyzed the effect of the CUP conditions, assuming they were imposed, in whole or in part, on the license, he would have reached a different result. We do think, however, that, given the possibility that could occur, his failure to conduct such an analysis vitiates the decision.[14]

ORDER

The decision of the Department is reversed and the case is remanded to the Department for further proceedings in accordance with the comments herein.[15]

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[14] We are well aware that the CUP conditions were not incorporated into the applicant's petition. The record does not indicate whether, during the application process, the Department informed appellant that a willingness to accept conditions on a license might improve the prospects of its getting one. Appellant's ignorance of a procedure the Department commonly utilizes should not be permitted to deny appellant a fair, and complete, opportunity. (See USG Enterprises, Inc. (March 20, 2000) AB-7117, at pages 13-14.)

Having said that, we reiterate that whether or not any license ultimately issues is dependent upon the Department's discretion, reasonably exercised.

[15] 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.

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.