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

AB-7650

JAMES LISSNER, Appellant/Protestant

v.

PIERVIEW, LLC, dba Jackson's Village Bistro
517 Pier Avenue, Hermosa Beach, CA 90254,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 41-354692 Reg: 99047634

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 7, 2001
Los Angeles, CA
ISSUED JULY 31, 2001

James Lissner, (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Pierview, LLC, doing business as Jackson's Village Bistro, for an on-sale beer and wine public eating place license.

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant, Pierview, LLC, appearing through its representative, Art Rodriguez; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

---

[1]The decision of the Department, dated May 25, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant's Petition for Conditional License was filed October 1, 1999. Protestant and others filed protests against the issuance of the applied-for license. An administrative hearing was held on January 26, 2000, at which time documentary evidence was received and testimony was presented by Department investigator Joann Aguilar and protestant James Lissner.

Subsequent to the hearing, the Department issued its decision which determined that the license should be granted if the applicant agreed to the seven conditions in the Petition for Conditional License, with the addition of an eighth condition prohibiting live entertainment.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: 1) The finding of public convenience or necessity is not supported by substantial evidence in light of the whole record; 2) the decision is unenforceable and deprives protestant and the community of their right to due process; and 3) the Department's definition of public convenience or necessity is unconstitutionally vague, depriving protestants and applicants of their right to due process.

DISCUSSION

I

Appellant contends the determination that granting the license would serve public convenience or necessity is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

As part of this contention, appellant argues that the applicant, whose burden it is to demonstrate public convenience or necessity, did not do so. The applicant provided only a copy of its menu, and, appellant contends, this was not sufficient to "establish the elements we [apparently appellant and the others who originally filed protests] believe to be part of 'public convenience or necessity'."

Under Business and Professions Code[2] §23958.3, subdivision (b)(1), the Department may issue a license to applicant if applicant "shows that public convenience or necessity would be served by the issuance." The decision finds (Finding IV. C.):

> "After considering such factors as the type of license requested, the availability of similar cuisine in close proximity to the premises, the fact that the premises are located near the beach and Hermosa Beach and Pier which are highly visited and well traveled areas, the preponderance of the evidence established that the issuance of the applied-for license would serve public convenience or necessity."

The decision also determined (Determination of Issues III. B.):

> ". . . it has been established that the granting of the applied-for license will serve public convenience or necessity because the Applicant's premises are located in a heavily traveled and visited beach area and because the premises offers a wide variety of Mediterranean, Mexican and Peruvian cuisine which is not readily available at other eating establishments located in the area as set forth in Findings I and IV. The fact that the local law enforcement agency did not object to the issuance of the applied-for license, the type of license and the type of operation were also considered in making this determination."

It appears that appellant is really asking this Board to substitute its judgment of the evidence for that of the Department and the ALJ. When, as here, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board,

---

[2]Unless otherwise noted, all statutory references in this opinion are to the Business and Professions Code.

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 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

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] (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]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellant argues that the cuisine was not a justifiable basis for the Department's finding and determination because menus of nearby establishments (Exhibits I and II) show that applicant's premises offers food items found in at least five of eight nearby restaurants. It is true that some of the nearby restaurants offer dishes in common with some of appellant's offerings, but appellant also serves some dishes that are different from those served in the other restaurants. This is sufficient to constitute substantial evidence supporting the finding.

Appellant also contends that evidence does not support the finding that the premises is located in a heavily traveled area, because no statistical data was presented as to the demand for additional licenses. Statistical evidence is not necessary. It was sufficient for the investigator to testify, based on her personal knowledge of the area, that it is a heavily traveled tourist area. In any event, appellant presented no evidence to the contrary.

Appellant also argues that "The lack of objection by local law enforcement does not establish the affirmative concept of 'public convenience or necessity'." While that may be true, it does not negative that concept.

The fact that appellant and others may believe that public convenience or necessity would not be served by issuance of the license does not mean that the Department must defer to the protestants. When there are conflicting interests that must be balanced, the Appeals Board will generally uphold the Department's exercise of discretion in determining public convenience or necessity when issuance is beneficial to some, even if it might be adverse to others. (See Lissner v. Hennessey's Tavern, Inc. (1998) AB-6911; Adcock v. Uthman, (1992) AB-6175.)

We conclude that there was substantial evidence supporting the findings and the findings support the determination of the Department that public convenience or necessity would be served by issuance of the license.

II

Appellant contends the decision deprives him and the community of their right to due process and is contrary to public welfare and morals. According to appellant, the decision violates due process because once the license is issued conditions can be

removed without notice to the public or an opportunity for objections to be heard. It is contrary to public welfare and morals, appellant argues, because the ALJ found that it would be contrary to public welfare and morals for the license to issue without the condition prohibiting live entertainment, and there is no provision in the decision to prevent removal of that condition after the license is issued.

We must reject appellant's contentions. Appellant is arguing about things that have not happened yet and may never happen. In addition, notice is provided to the community, at least technically, because §23803 provides that written notice of the intention to remove or modify a condition must be given to "the local governing body of the area in which the premises are located." This body then has 30 days to object to the modification or removal of the condition, and, if an objection is filed, the Department must hold a hearing. Appellant's remedy, if a petition should be filed at some time to modify or remove conditions, lies with the local governing body.

III

Appellant contends the Department's definition of public convenience or necessity is unconstitutionally vague and therefore deprives both applicants and protestants of their right to notice, violates due process, and is void as a matter of law.

This is essentially an attack on the constitutionality of §§23958 and 23958.4, both of which use, without definition, the term “public convenience or necessity.” The California Constitution, article III, section 3.5, prohibits an administrative agency, such as the Appeals Board, from holding an Act of the Legislature unconstitutional except in specified circumstances, none of which are present here. Consequently, we decline to consider this issue.

We note, however, that appellant has made similar attacks on "public convenience or necessity" in prior cases, contending that use of the term without a specific definition made the Department's decision arbitrary and capricious. This Board has consistently rejected appellant's argument when considering it on this basis. A full discussion of the issue was included in the Board's decision in Vogl v. Bowler (1997) AB-6753.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.