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

AB-7704
File: 48-358176 Reg: 00048527

BILL RAY BAXTER dba Kahuna's Coral Inn
873 Turquoise Street, San Diego, CA 92109,
Appellant/Applicant/Licensee

v.

David Bejarano, Chief of Police, City of San Diego, et al.
Respondents/Protestants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 17, 2001
Los Angeles, CA
ISSUED NOVEMBER 13, 2001

Bill Ray Baxter, doing business as Kahuna's Coral Inn (applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied his application for an expansion of his on-sale general license to include a patio area. The protests filed in the matter were sustained.

Appearances on appeal include applicant Bill Ray Baxter, appearing through his counsel, John B. Barriage; protestants David Bejarano, Chief of Police, appearing through his representative, Sergeant Mike Davis, and Christine Fuller, William M. Lisec, Mark Schollaert, Candace M. Smith, Neva G. Sullaway, Steve Sullaway, and Peter Vogel; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated September 7, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On September 1, 1999, applicant filed an application with the Department essentially requesting that the existing license be expanded to include a patio area between the front of the existing premises and the existing parking area which area borders on Turquoise Street. The patio would be "open air" with some fencing around the parameters of the patio [Exhibits 2, 3-A, and A-1 though and including A-5]. The Department gave notice on February 17, 2000, that the application was denied.

An administrative hearing was held on July 11, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the Department investigator, police witnesses and local residents, and witnesses for applicant, concerning the application to expand the license to the proposed patio.

Subsequent to the hearing, the Department issued its decision which determined that the application should be denied. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that he had met his burden under the law and that the application should be granted.

DISCUSSION

Applicant contends that he had met his burden under the law and the license should be granted, arguing that he showed by substantial evidence that the addition would not interfere with residential quiet enjoyment, which includes parking, and would not pose a law enforcement problem. Applicant argues the testimony presented did not show that his proposed operation would be detrimental to residential quiet enjoyment, create a law enforcement problem, or create traffic congestion. The argument points to the fact no one offered substantial evidence that the proposed patio would create these concerns.

As in matters such as this, the Department is authorized by the California Constitution to exercise its discretion whether to deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would be contrary to public welfare or morals.

The Appeals Board's review on the other hand, 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.[2]

For the purpose of this review, "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].) 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].)

Assistance in the review of this matter, is found in the case of Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App.2d 489 [30

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[2]The 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. 219, 222], which enumerated several considerations the Department may consider in determining if a license would endanger welfare or morals: "the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protests made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

The protestants who testified told of a now more mellowed but constant annoyance from the premises especially at 2 a.m. when the premises closes. Other witnesses, testified of only rare disturbances. Applicant testified that he made many changes within the premises to reduce sound escaping to the outside. It is applicant's opinion that 99% of the noise problems will be solved by the patio addition [RT 165]. The opinion appears to be without some factual basis, other than it will allow smokers to stay in the patio, presumably with their drinks.

An absurdity made obvious by the record, but not mentioned in the decision by the Department, is that the front portion of the premises is open,[3] with garage-type doors which are closed during the after-hours, and opened when the premises is open for business. According to the testimony of the Department investigator and appellant [RT 35-36, 149], there are no walls or other obstructions between

[3]The patio is shown as 6 feet in the Findings (2½ feet according to the testimony at RT 130) by 30 feet. The premises is shown being approximately 50 feet by 50 feet (RT 130). Exhibits A-5 and A-6, seem to show that the open area of the actual premises facing the patio, is about 30 feet across, making a sizable entrance for easy ingress and egress of patrons, and noise.

the premises and the proposed patio. Exhibits A-5 and A-6, appear to show this openness to the premises, except for apparent walls on either side of the patio area. Considering the testimony and the exhibits, it appears that whether or not the patio becomes licensed, the noise factor would remain the same, considering the openness of the premises, and including the patio.

The witnesses' testimony to some extent is in conflict. 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].) 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] (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].)

While credibility is not a major issue, as the witnesses all testified to some noise problems, we observe that 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].)

Applicant refers to a prior matter in 1990 which concerned allegations of 181 incidents of noise and community disturbances for approximate nine months. Applicant alleges in the present matter, that he has changed his operation, and has installed many additions to the premises to correct such disturbances and capture the internal noises. The Department found in the 1990 matter that the majority of the allegations were true, and conditionally revoked the license for a probationary period of two years with a 90-day suspension. The Appeals Board affirmed the decision except for the penalty, which the Board held to be excessive. The Department reduced the penalty to 60 days to which the Appeals Board affirmed. However, in 1997, the Department sought to vacate the conditional revocation of the 1990 matter and revoke the license, for the violations of selling alcoholic beverages to minors. The Appeals Board reversed the revocation, and made the following comments in the Board's 1998 decision of reversal:

> "The record shows that the 1993 [1990 violations] decision's probationary period was imposed due to multiple violations alleging noise, loud yelling, and loud music, in the late and early morning hours, often nightly, and over an approximate nine-month duration of time. And the record shows that the 1993 decision appears to have accomplished the end result to which the terms of probation were crafted by the Department – to command appellant's attention to the fact that noise and disturbance of nearby residents would not be tolerated by the Department (and should not have to be tolerated by nearby residents) and, if continued, the license would be revoked.[4] The record shows no such outlandish conduct since the 1993 decision, forcing the conclusion that the probationary terms and period accomplished their intended objectives. We determine that the record clearly demonstrates that appellant has been free of the violations which gave rise to the probation contained in the 1993 decision ...

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[4]The record does not show any other accusations which were filed against appellant's license due to noise, disturbances, et al., problems, since the 1990 incidents which went to decision in 1993. This does not in and of itself negate that such problems were not present, only that the Department did not officially charge appellant for any such misconduct.

> [The Board then discussed the 1994 and 1995 decisions concerning sales to minor persons which gave rise to the question of revoking the license.] As to a showing of a pattern concerning sales to minors, the record of progressive penalties shows for a 1989 decision, five days; for the 1994 decision, 35 days with 10 days stayed, or a net of 25 days; and in the 1995 decision, 60 days, with 30 of those days stayed, or a net of 30 days. What the next progressive step would be to curb this inclination to allow minors into the premises to drink, is not for the Appeals Board to determine, but such progression does not indicate that unconditional revocation is a legitimate penalty for the violations enumerated. (¶) There is a disquieting thread that runs through the record. In the 1994 and 1995 decisions' proceedings, the Department sought extremely high penalties where such were clearly unwarranted (see facts and procedural history, ante). It is patently clear from a review of the record that there are strong feelings between the Department and appellant. Be that as it may, appellants' duty is to obey the law or lose his license."

In the present matter, many nearby residents filed protests against the addition, citing nightly noise including loud singing over a microphone by persons and appellant himself, public urination by patrons of appellant, threats by appellant and also his patrons to local residents, traffic problems at closing, use of the area's streets for patrons of appellant, and frequent police activity and presence at the premises. We will hereinafter, consider the evidence and testimony given in the present matter.

A. Nightly noise

Protestant Mark Schallaert testified to noise being heard several times a week, including voices on a microphone, yelling, and screaming, but he never complained. The entire front of the premises is open. Weekends seem to be worst, and especially at closing about 2 a.m. The problem has been about the same for the last five years [RT 80-90].

Protestant Candace Smith hears noise nightly with weekends the worst. The noise, apparently in the year 2000 appeared to lessen from preceding years [RT 96-104].

Protestant Sullaway has been disturbed by noise for the last 11 years, by shouting and yelling [RT 111-118].

The greatest concern, not addressed by the Department, is the fact that for a non-specified time, approximately 30 feet (out of the front of the premises, totally measuring 50 feet across) of the premises front is open at all times the premises is in operation.

We question why an addition of an approximate 3 X 30 foot patio, also open to the air, but with a "noise catching roof" as has the premises itself, creates any more of a problem than the present open-front premises. Would such an addition with people in the patio create appreciably more noise than at present? The Department has focused on the wrong problem and denied the license without substantial evidence. Such rejection at this time would only give the illusion of proper control over appellant.

We pass to another disquieting problem. The testimony, trite as it may be, raises specters of constant noise, especially at 2 a.m., that no resident should have to endure.

The Department has allowed this premises to interfere with nearby residential enjoyment for some 5 - 10 years. After the 1990 incidents of noise and all types of Disorderly House violations, the Department just conditionally revoked the license without conditions curbing noise. Even if the protestants' complaints are only partially true, the Department has left this segment of the populace with little concern or protection.

Again, the real problem is the premises, and the addition adds but little to the problem. As we find the whole of the record, there is no substantial evidence that the addition of the patio will exacerbate the problem created by the continuing open air premises of an opening in front of approximately 30 feet. We see this denial as a

"cloaking" of the real problem. This slight of hand cannot be used to bootstrap the denial where there is no substantial evidence that the patio will cause or increase the problems voiced.

B. Threats

We find no substantial evidence to support this issue.

C. Traffic and Parking

Apparently, there is a problem with parking as space is limited in front of the premises. While applicant states 90% of his patrons walk to the premises [RT 156], it appears that many patrons park in the evenings in a closed carwash business area, where fights and disturbances occur, presumably by appellant's patrons [RT 85, 102].

A review of the record shows only minor irritation caused by parking. The major item of parking is the fact that fights occur in the adjacent areas during and after hours.

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).

The Department cites Rule 61.4 as the major basis for concluding the patio should not be licensed. The Rule set forth in pertinent part states:

> "No ... premises-to-premises transfer of a retail license shall be approved for a premises at which either of the following conditions exists: (¶) (a) The premises are located within 100 feet of a residence.... (¶) Notwithstanding the provisions of this rule, the department may ... 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."

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.

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 [an on-sale license], 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 [an off-sale license], 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 [an on-sale license], the Board cited many cases concerning quiet enjoyment and its supreme importance to the extent "that rule 61.4 is nearly absolute."[5]

However, in this matter, the Department as the guardian of the public welfare and morals, has allowed the problem to exist. Denial of the application does not resolve the problem the Department has missed in this application matter.

D. Police Calls

There is no substantial evidence on this issue. The testimony and exhibits (6 and 7) add little and are mere generalities. The testimony only states that the area has higher incidences of crime than the overall city experiences.

What is glaringly absent, is evidence of police calls to the premises by the police, not calls to the nearby area of the premises. This is a case built on innuendos with an absence of precise facts. While this premises should be controlled, it should be done properly.

ORDER

We determine there is no substantial evidence connecting the proposed patio

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[5]Citing 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.

to the overall problems at the premises. While we may only comment on the obvious concerns of nearby residents, we cannot ignore the lack of credible investigation that missed the real issue and substituted a false basis for denial.

The decision of the Department is reversed.[6]

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

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[6]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.