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

AB-7729

File: 48-346660 Reg: 00048906

L.A. WILSHIRE EXECUTIVE CLUB, INC. dba Los Angeles Club
3240 Wilshire Blvd., Third Floor, Los Angeles, CA 90010,
Appellant/Applicant

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 1, 2001
Los Angeles, CA

ISSUED FEBRUARY 21, 2002

L.A. Wilshire Executive Club, Inc., doing business as Los Angeles Club (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied its application for a person-to-person and premises-to-premises transfer and exchange of a special on-sale general license to an on-sale public premises license.

Appearances on appeal include appellant L.A. Wilshire Executive Club, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

FACTS AND PROCEDURAL HISTORY

On September 16, 1998, appellant applied for a person-to-person and premises-

[1]The decision of the Department, dated October 19, 2000, is set forth in the appendix.

to-premises transfer and exchange of a special on-sale general license to an on-sale public premises license for premises to be located on the third floor of a building in the Koreatown section of the City of Los Angeles. The application was opposed by the Los Angeles Police Department, and was denied by the Department.

Appellant petitioned for a hearing on its application, and a hearing was ordered by the Department. The notice of hearing stated that issuance of the applied-for license would be contrary to welfare and morals as provided in article XX, §22 of the California Constitution, Rule 61.4 (Title 4, Cal. Code Regs., §61.4) and §§23958 and 23958.4 of the Business and Professions Code,[2] alleging specifically:

(a) three residences are located within 100 feet of the proposed premises and/or the closest edge of the parking lot to be operated by appellant;

(b) issuance of the license would result in or add to an undue concentration of licenses; and

(c) issuance of the license would tend to aggravate an existing law enforcement problem for the Los Angeles Police Department.

An administrative hearing was held on August 30 and 31, 2000, at which time oral and documentary evidence was received. At that hearing, testimony with respect to the crime statistics for the census tract was presented by Dorrya Dksari, a systems analyst for the Los Angeles Police Department, and Maggie Kinkella, a Department investigator. The investigation of appellant's application for the transfer was conducted by Leslie Downs, who, in her testimony, summarized her investigation and recommendations. Los Angeles police sergeants Carol Gavin and Mike Richardson

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[2] All statutory references are to the Business and Professions Code unless otherwise noted.

testified and, based upon their personal experience, expressed opinions that the transfer would tend to aggravate an existing crime problem because of the pervasive presence of local gangs. Dr. Kee Whan Ha, a shareholder of appellant, testified that the object of the club was to provide an opportunity for Koreans over the age of 30 to sing karaoke, one not available in typical American clubs because of language and cultural differences. Steven Ha testified, via stipulation, that he worked near the proposed premises, and would enjoy going to a club such as the proposed premises. Jeong Koo, appellant's president and general manager of the building, described appellant's intentions regarding security and parking.

Subsequent to the hearing, the Department issued its decision which denied the application, concluding that issuance of a license would tend to aggravate a current law enforcement problem and would result in an undue concentration of licenses. In addition, the Administrative Law Judge (ALJ) concluded that, even if public convenience and necessity had been shown, the Department was not obligated to issue a license, nor was it necessary for him to determine whether the applicant had established that the operation of the club would not interfere with nearby residences. Appellant challenges each of these grounds, contending that the ALJ abdicated his responsibility to make his own findings on the issues.

DISCUSSION

Business and Professions Code §23958 requires the Department to conduct an investigation of all matters relating to an application for a license or transfer of a license, and that it deny an application or transfer "if either the applicant or the premises for which a license is applied do not qualify for a license under this division." It provides

further that the Department shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance of the license would result in or add to an undue concentration of licenses, except as provided in §23958.4. Section 23958.4 defines "undue concentration," and permits the issuance of a license where, despite the existence of reported crimes and the ratio of issued licenses to population above stated levels, the applicant shows that convenience or necessity would be served by its issuance.

With this in mind, we examine the reasons given by the Department for its denial of the application in this case.[3]

A. Law enforcement problem.

The proposed decision accepted the opinion of the Los Angeles Police Department that, because of the prevalence of gangs in the immediate area of the applicant's building, issuance of the license would tend to aggravate a current law enforcement problem.

Police Sergeant Mike Richardson testified that the biggest problems with gang members in connection with a business such as appellant's would be late night street robberies of inebriated patrons, usually on a side street or in a parking lot as the victims approach their vehicles. On cross-examination, Sergeant Richardson exhibited considerable unfamiliarity with the applicant's plans for handling the parking situation, including the use of valet parking and security guards.

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[3] We note at the outset that the ALJ appears to have accorded controlling deference to the findings of the Department investigator, to the extent that he failed to make the very findings for which the hearing was held. (See Determination of Issues, paragraph IV.)

Police Sergeant Carol Gavin testified in similar fashion, asserting that the Los Angeles Police Department opposed the issuance of the license because of gang activity in the area.

Although the evidence revealed that the are had a crime rate in excess of the reporting average, there was little or no evidence of alcohol-related criminal activity.

The decision determines that issuance of the license would aggravate an existing law enforcement problem. However, since the ALJ found that the applicant had, through its plan for valet parking and secured parking lots, "satisfactorily addressed" the police concerns that patrons leaving the premises late at night might be crime victims, the determination must rest solely on the supposed impact of gang presence.

Yet, there is little or no evidence that suggests that the planned style of operation of the premises will invite gang interest. The premises will operate on the third floor of the building, with other tenants consisting of retail shops, and will cater to a more mature clientele of Korean businessmen.

B. Undue concentration and public convenience or necessity.

On June 29, 1999, over a year after the application was filed, the Los Angeles City Council made a determination that public convenience or necessity would be served by the issuance of the license. The Department contends the determination was untimely; it asserts that the determination must be made within 90 days of receipt by the Council of notice of the application.

The decision does not squarely address the issue of timeliness. Instead, the decision, at best, concedes the presence of public convenience, and then finds it

irrelevant (Determination of Issues II):

> "[Appellant] has shown that its club would be a desirable place for certain Korean Americans to go to participate in karaoke singing. Neither the Department nor the Los Angeles Police department has any objection to [appellant] achieving that goal.
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> "However, [appellant] has not shown that public convenience or necessity would be served by the issuance of an alcoholic beverage license to it. Nevertheless, it can reasonably be assumed that some of [appellant's] customers would enjoy alcoholic beverages when they sing. In other words, public convenience can be assumed. However, the statute only authorizes the Department to issue a license when public convenience or necessity is shown. There is no requirement that the Department exercise that authority." (Emphasis in original.)

We do not think the determination by the Los Angeles City Council should be ignored simply because it was not made within the 90-day period. The obvious purpose of the statute in imposing the time limit, and then affording the applicant an opportunity to prove public convenience or necessity on its own, was to expedite the application process, not create another time barrier against the issuance of a license.

Nor can we agree with the Department that it can ignore a showing of convenience and necessity when its presence would eliminate one of the statutory reasons for the denial of a license and no other reasons for denial have been established. The statement that "There is no requirement that the Department exercise that authority" is simply too broad.

C. Rule 61.4

Rule 61.4 provides, in pertinent part:

> "No original issuance of a retail license or the 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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> (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.
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> ...
>
> "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."

The ALJ did not make any findings on whether the operation of appellant's business would interfere with residences within 100 feet of the proposed premises. Instead, he wrote:

> "It is not necessary to determine whether [appellant] has established that the operation of its club would not interfere with the nearby residents' enjoyment of their properties. Rule 61.4 only authorizes the Department to issue a license when such noninterference is established. There is no requirement that the Department exercise that authority. Because there are residents within 100 feet of the parking lots maintained for [appellant's] anticipated customers, the Department investigator was well within her discretion to recommend denial of [appellant's] application for an alcoholic beverage license, in accordance with the Department's Rule 61.4"

The first problem we have with what the ALJ wrote is that it merely defers to the investigator's recommendation, and makes no finding one way or the other on the critical and controlling issue - would operation of the premises interfere with the quiet enjoyment of residences within 100 feet of the premises. Such an approach ignores the evidence, some of which suggests that there would be little or no interference with the few nearby residences because of the club's third floor location in a commercial building and a secured, valet-controlled parking system, with vehicles turned over to patrons at a building entrance located a considerable distance from the residences.

The second problem we have is his implicit suggestion that, even if an applicant satisfies the burden imposed by the final paragraph of Rule 61.4, the Department need not grant the license sought, even if there is no other reason for denying it.

We reject as arbitrary the philosophy which seems to be reflected in the decision's treatment of the convenience or necessity issue and the Rule 61.4 issue - that, even if an applicant meets its burden on those issues, the Department may, nonetheless, reject the application.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for further proceedings in light of the comments herein .[4]

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

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[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.