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

AB-7778
File: 47-352269 Reg: 00049238

CKM INVESTMENT GROUP, LLC dba Ole Madrid Café
751-755 Fifth Avenue, San Diego, CA 92101,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED MARCH 5, 2002

CKM Investment Group, LLC, doing business as Ole Madrid Café (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days with 10 days stayed for a probationary period of one year, for permitting the violation of a condition on its license by permitting patrons to obstruct a public sidewalk in front of the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of Business and Professions Code §23804.

Appearances on appeal include appellant CKM Investment Group, LLC, appearing through its counsel, William A. Adams, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated February 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on July 20, 1999. Thereafter, the Department instituted an accusation against appellant charging that the condition concerning obstruction of a public sidewalk had been violated.

An administrative hearing was held on December 6, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the condition had been violated.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the issue that the Administrative Law Judge (ALJ) abused his discretion by finding appellant permitted an overcrowding on the public sidewalk in front of the premises.

DISCUSSION

In essence, appellant contends that there was not substantial evidence to support the decision and its findings. "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].)

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].)

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].)

The condition in question states:

> "[Appellant] shall employ no less than one person from 9:00 PM to one-half hour after closing, who shall be distinguished by appropriate uniform or company attire so as to be easily identifiable as a security person, whose specific duties shall be to patrol the exterior of the premises to insure there is no excessive noise, abusive behavior, public disturbance, obstruction of public sidewalk or other violations of law generated by patrons awaiting admission, or leaving the premises. The number of exterior security persons required will be increased at a ratio of one for each twenty-five persons awaiting admission to the premises."

From the findings, it appears that that portion of the condition which was violated, states:

> "[Appellant] shall employ ... security person[s], whose specific duties shall be to patrol the exterior of the premises to insure there is no ... obstruction of [the] public sidewalk ... by patrons awaiting admission, or leaving the premises."

Appellant questions the present Department's decision in light of a prior matter filed by the Department against appellant (under different ownership) in 1997. In that case, Ole Madrid Café San Diego, Inc. (1997) AB-6702, a condition worded similarly to the condition in the present matter, was found not sufficient to sustain the Department's decision. The Department found that the interior of the premises was allowed to be overcrowded which allowed for the blockage of passageways, which was a specific duty of the security personnel to maintain clear and open. We said:

> "Thus, we believe it is a tortured construction of condition A to focus on the result the security is expected to achieve rather than the mechanism the condition creates to achieve a goal identified only in general terms. For example, some of the other expected duties of security personnel referred to in the condition are to

> insure against consumption of alcoholic beverages to minors, or service to intoxicated persons. Assuming that staffing requirements were otherwise met, would it be reasonable to charge a violation of condition A if appellant makes a sale to a minor? We think not. We think the Department would first have to show some deficiency in the staffing requirements. It has not done so here."

We determine in the present review there are not a few deficiencies with the Department's decision.

We have great difficulty in the over broad language of the rule presently under review. It mixes numbers in personnel requirements with a listing of their duties and objectives. This is the same problem we encountered in Ole Madrid, supra, which the Department has patently ignored. This creates a highly ambiguous and multi-faceted condition allowing for less precision in its wording, and open to a too-broad interpretation by the Department. The condition is clear as to the requirements of numbers of personnel to be on hand, but unclear as to what area and control such personnel could demand conformity to the objectives of the condition. The sidewalks are the public domain, and not subject to private control. To conclude otherwise, as the Department has attempted to do, would bring chaos to control of the city and its street and sidewalks. It is nice to so state on paper as the condition is before us, but when one considers the larger picture, and the attempt to control the public domain, the problem is then seen in its true light, and an attempt to force appellant to do acts and control events improperly and illegally.[2]

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[2]The case of Gray (1996) AB-6502, is in point. In that case, we pointed out that the licensee had no right of control over patron conduct on the public sidewalk in front as well as beside the licensed premises. That public domain was under the control of the police, not appellant, and the Department's decision ordering sanctions due to appellant's failure to act illegally, was reversed by the Appeals Board.

We have concern in reviewing the record, and especially the exhibits, that a street condition (or setting) was allowed to be created, presumably by the city. The area configuration is nothing more than an "accident ready to happen," as the record clearly shows an area fraught with obstructions in a "people movement obstacle course." While in our review we have no control of the circumstances presented to us, we are not powerless to call attention to a scene which the present factual situation is but an expected and obvious result of poor planning for the movement of people. The Department's decision acknowledges that a usual weekend brings heavy pedestrian traffic in front of the premises.

We also have difficulty with the apparent acknowledgment of the Department that this night, May 5 and 6, had some special and foreseeable problems in that appellant added additional security for that evening. As we view the record, considering the configuration of the public sidewalk with the fenced patios on that sidewalk, the inadequate appearance of police officer control of that public sidewalk was the major contributor of the problem, a foreseeable event. Police control was too little and too late. The problem is a police problem of public sidewalk control, with the record showing an almost complete lack of awareness by the police of the problem, and inadequate response.

Next, as we consider the events of that early morning, we are not amused.

The street the premises is on is a primary street in the "Gas Lamp District" so called for its gas-lighted varieties of street lighting fixtures, a small area with a planned longing for times past, with about 10 restaurants in the immediate area. About 9:30 pm to 10 pm, appellant closes down its restaurant operation, and converts its operation to a

nightclub [RT 30].

On this particular occasion, about midnight, a Cinco de Mayo celebration ended about a block away, a nearby movie theater ended, and a restaurant next door to the premises was having an opening night celebration. About 12:30 am, apparently due to these events for which appellant had added additional security personnel, there was a surge of pedestrian traffic along this restaurant area, and also in front of the premises. Since the premises is a popular place to be on the weekends, stanchions were placed out in front of the premises to form a roped line for patrons desiring to enter, and to allow pedestrian traffic to go around the patron lines [RT 18, 21, 23, 30, 43, 47-48, 112].

To complicate the matter, a valet service, which services patrons of the nearby restaurants, including appellant's premises, was under-staffed so cars and customers stacked up, all around the sidewalk at the edge of the premises' sidewalk area [RT 11, 52-53, 111, 130].

Sergeant Gerald Alton arrived at about 12:30 am, and was at the area about 20 minutes. He observed the line into the premises was static with little into-the-premises movement. As the surge of people became intensified, he had accompanying officers place barricades beyond the curb area into the street to allow the movement of this surge of people into the street area. He stated that such pedestrian traffic is usually heavy on Friday and Saturday nights [RT 13-16, 24-25, 31]. The decision of the Department notes that "... The premises line most often limits the sidewalk to the width of one person." The sergeant also acknowledged that appellant and the police over the years have tried to solve this problem, trying experiments of moving the line of potential patrons into different locations, which apparently were all unsuccessful, returning to

stacking the potential patrons in front on the sidewalk. The line sometimes intermingles with the lines of the other restaurants on either side of the premises [RT 31, 44-46].

While the officer did not count the number of security present, he has, over time, observed that transient people moving through the area do not want to move, want to loiter, and possibly consider if they want to enter the premises, and ofttimes argue with appellant's security. The sergeant has at times intervened to explain the problem of loitering in such a people-compacted area [RT 58-59, 60, 64].

Police officer Raymond Stachnick arrived at about 1:30 am. People were standing around and no line was present for people to enter, apparently, as the premises was shutting down for the night. The officer could not tell if the people milling around were appellant's patrons [RT 67-68, 78-79, 80, 84].

The record shows that the attendance at appellant's premises that night and early morning hours was average for a weekend summer night [RT 91]. Gary Batchelder, appellant's general manager, stated that the heavy traffic in front was caused by people slowing just to see if they want to enter [RT 98]. Dean Allen, appellant's bar manager, stated that there was that evening and morning, a "mass" of people waiting at the common valet service [Rt 130].

The record insufficiently shows that premises' patrons waiting in line was the precipitating problem, other than the times noted that the single line would from time to time expand to two or three people deep, apparently in a socializing manner - we wonder if security could adequately control such a social phonemon, and if the security personnel have the power to control conduct on a public sidewalk. It is our view that this is a police problem, practically impossible for private persons to control,

notwithstanding the pontificating of the Department to the contrary in its decision under review. There is insufficient evidence in the record to show improper security involvement, or lack of allowable control of patrons on the public sidewalk. The surge of passing-people problem was not within the control of appellant. The problem seems to be lack of police involvement on a public sidewalk. The question of whether the line was a precipitating factor is in doubt from the record as a whole.

The only significant complaint Sergeant Alton offered was when he arrived, he did not observe any security on the sidewalk, only in the patio area of the sidewalk [RT 58]. Officer Stachnick's complaint was that while the sidewalk was full of people, security were socializing, while there was no line and the premises was closing [RT 71-72, 80, 84].

Another major problem is shown in Exhibits B-1 through B-6. The exhibits show a wide sidewalk in front of the restaurants and the premises. About more-than-one-half to two-thirds of the sidewalk is obstructed by fencing enclosing patios, used by each of the restaurants for their own purposes. The remaining approximate less-than-one-half to one-third of the sidewalk estimated at 6 to 8 feet [RT 12], is obstructed by parking meters, trees, street-light standards, which are obstructions which would cause a "zig-zagging" of usual sidewalk traffic. As we perceive the record and especially the exhibits, we observed an insolvable problem without proper police control and effectiveness. Walking in front of the premises and the other two restaurants, appears from the photo exhibits, to be a maze of impediments to straight-line walking, which would naturally slow such people movement.

We conclude the Department has attempted to impose upon appellant a

responsibility, written ambiguously, which it cannot manage through no appreciable fault of its own. We cannot condone a sanction which is attributable to inadequate police responses. And frankly, we cannot envision what security could do if the line of patrons got out of hand on the public sidewalk. The condition is wordiness without proper means shown to accomplish the result the Department apparently envisioned. There is no substantial evidence of a dereliction of duty under the condition as worded.

ORDER

The decision of the Department is reversed.[3]

TED HUNT, CHAIRMAN
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.