

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

AB-7816

File: 47-355234 Reg: 00049418

JAMES LISSNER, Appellant/Protestant

v.

DANIEL B. MILLER, dba Dano's Beach Grill
1320 Hermosa Avenue, Hermosa Beach, CA 90254,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 22, 2002

James Lissner (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ granting the application of Daniel B. Miller (respondent/applicant), doing business as Dano's Beach Grill, for the person-to-person and premises-to-premises transfer to him of an on-sale general public eating place license.

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant, Daniel B. Miller; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 3, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant has operated Dano's Beach Grill at the address shown above under an on-sale beer and wine eating place license since September 8, 1999. Thereafter, he applied for the license transfer noted above and filed a Petition for Conditional License. Protestant and others filed protests against the issuance of the applied-for license. An administrative hearing was held on April 10, 2001, at which time documentary evidence was received and testimony was presented by Department investigator Dwight Pickens, by applicant Daniel B. Miller, and by protestant James Lissner.

Subsequent to the hearing, the Department issued its decision in which Lissner's protest was denied, the protests of the non-appearing protestants were deemed abandoned, and issuance of the conditional license was allowed.

Appellant thereafter filed a timely notice of appeal in which he raises the following issues: 1) The ALJ erred in finding that issuance of the applied-for license would not result in or add to an undue concentration of licenses; 2) the ALJ erred in failing to make a determination of public convenience or necessity; and 3) the decision is unenforceable and deprives protestant and the community of their right to due process.

DISCUSSION

I

Appellant contends the Department erred in determining that issuance of this license would not result in or add to an undue concentration of licenses.

Finding III states:

"Applicant's restaurant is located in census tract number 6310.02. According to the formula provided in Business and Professions Code Section 23958.4, five

on-sale licenses are allowed in that census tract. There currently are twenty-five. If Applicant's application for a Type 47 license is granted, his type 41 license would be cancelled. 'Issuance of the type 47 license would cause no change in the number of on-sale retail licenses in the census tract and, therefore, could not "result in or add to" an undue concentration of licenses.' Dahdah Trading Corporation (1999) Alcoholic Beverage Control Appeals Board Case number AB-7304, page 4."

Appellant contends that "[t]he quote is not from a published case and is not proper precedent. Other than the quote from the Dahdah case, Judge Lo provided no discussion of his own rationale."

Appellant also argues that the finding was not supported by the evidence since the Petition for Conditional License contains the following stipulation: "Whereas, the petitioner(s) stipulate(s) that by reason of the aforementioned over concentration of licenses, grounds exist for denial of the applied-for license(s); . . ."

Section 23958 requires the Department to deny an application for a license "if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." Section 23958.4, subdivision (a), states that "undue concentration" exists where the area in which the applicant premises is located has a specified greater-than-average number of reported crimes or the ratio of certain licenses to the census-tract population exceeds the ratio of similar licenses to the county's population.

The decision of the Appeals Board in Dahdah Trading Corporation v. Lissner, AB-7304, was issued on December 20, 1999. The applicant in that case also sought to replace its type 41 license with a type 47 license. The type 41 license would be cancelled if the type 47 license were issued. Thus there would be no change in the net number of on-sale licenses in the census tract. In its decision in Dahdah, the Appeals

Board said, "Issuance of the type 47 license would cause no change in the number of on-sale retail licenses in the census tract and, therefore, could not 'result in or add to' an undue concentration of licenses."

The ALJ in the present case simply adopted the analysis of the Dahdah case. This was appropriate, since the situations in both cases are the same. Appellant does not explain what he means when he says Dahdah is not "a published case and is not proper precedent." The Board's decisions are published as public records available to any interested party. Even if not binding, the decisions of the Appeals Board may be considered precedential to the extent that their analysis is persuasive. It was perfectly proper for the ALJ to use the analysis from Dahdah in this case which presents precisely the same legal question. The ALJ did not need to come up with "his own rationale."

Appellant complains that the ALJ did not say why the stipulation as to undue concentration in applicant's petition for conditional license was not "material." Applicant's petition, however, merely states that undue concentration exists; the point of the ALJ's decision is that issuance of the license in this case will not violate Business and Professions Code §23958 because it will not "result in or add to" the undue concentration.

II

Appellant contends the ALJ erred because he did not make a determination regarding whether issuance of the license would serve public convenience or necessity.

If it is determined that issuance of an applied-for license would result in or add to undue concentration, the license may still be issued if the applicant shows that

issuance of the license would serve public convenience or necessity. (Bus. & Prof. Code §§23958 and 23958.4, subd. (b).) If issuance of the license would not result in or add to undue concentration, the public convenience or necessity exception is not necessary. In the present case, the ALJ found that issuance of the license would not result in or add to undue concentration; therefore, it was not necessary for him to make a determination regarding public convenience or necessity.

III

Appellant contends the decision deprives protestant and the community of their right to due process and is contrary to public welfare and morals. The decision violates due process, according to appellant, because, once the license is issued, conditions can be removed without notice to the public and an opportunity for objections to be heard. It is contrary to public welfare and morals, appellant argues, because there is no provision in the decision to prevent removal of the condition prohibiting live entertainment after the license is issued, and the ALJ found that it would be contrary to public welfare and morals for the license to issue without that condition.

Appellant made, and this Board considered and rejected, this same argument in Lissner v. Pierview, LLC (7/31/01) AB-7650. The same response is appropriate here:

"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."

ORDER

The decision of the Department is affirmed.²

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

²This 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.