

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

AB-7850

File: 21-363053 Reg: 00049814

LONGS DRUG STORES CALIFORNIA, INC.
Northeast Corner of Stanford Ranch Road & Park Drive, Rocklin, CA 95765,
Appellant/Applicant

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: July 11, 2002
San Francisco, CA

ISSUED SEPTEMBER 12, 2002

Longs Drug Stores California, Inc., appeals from an order of the Department of Alcoholic Beverage Control (“the Department”)¹ which, although granting its application for an on-sale general license for a drugstore to be located in a shopping center located at the Northeast corner of Stanford Ranch Road and Park Drive in the City of Rocklin, California, and overruling protests to its application, ordered certain conditions placed on the license to be issued.²

¹ The decision of the Department, dated June 7, 2001, is set forth in the appendix.

² A separate appeal by protestants Suzanne Evans, Robin Hathaway, Anthony Rakocija, D. Dayne Van Pelt, and Michael R. Van Pelt (Suzanne Evans, et al., AB-7849) was dismissed on December 4, 2001, pursuant to Business and Professional Code §23083 and Appeals Board Rules 187 and 190 (4 Cai. Code Regs, §§187, 190 and 199, subd. (b)), for their failure to perfect the appeal by payment of the costs or estimated costs of the record, including the transcripts of the administrative hearing, after demand for payment was made. The Department found that the individual grounds of protest had not been established, and the protests were provisionally overruled by the Department, subject to the applicant’s acceptance of the proposed

(continued...)

Appearances on appeal include Longs Drug Stores of California, Inc. ("Longs"), appearing through its counsel, John A. Hinman and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Applicant plans to build and operate a Longs Drug Store in a multi-tenant shopping center to be built at the major intersection of Stanford Ranch Road and Park Drive in the City of Rocklin. Several protests were filed against the application. After a hearing that lasted two full days (February 2, and March 9, 2001), the Administrative Law Judge (ALJ) overruled the protests and ordered that the license issue, provided that the licensee petition for the issuance of the license containing four new conditions in addition to the nine conditions set forth in applicant's original petition for conditional license. The four additional conditions were the ALJ's response to concerns about the proximity of several schools to the proposed premises, and his determination, based upon a plot plan exhibit, that a McDonald's fast food operation was to be located in the center:

"There is a concern that persons may obtain take-out food at the McDonald's, obtain an alcoholic beverage from applicant's premises, and consume both in the parking lot surrounding the premises. ... This concern about persons purchasing take-out food and alcoholic beverages and consuming them in the parking lot has been, and can be, addressed by limiting the sale of single and/or small containers of alcoholic beverages." (Determination of Issues VII.)

²(...continued)
conditions. The issues raised by protestants at the Department hearing are not before this Board, and will not be addressed.

...

“Determination of Issues No. VII described the concern about persons obtaining take-out food at McDonald’s, obtaining an alcoholic beverage from the proposed premises, and consuming both in the parking lot of the premises, thus affecting the safety of children in the area. Issuance of a license without additional conditions to minimize this possibility would be contrary to welfare and morals. Accordingly, this application for a license would be denied unless Applicant submits a Petition for Conditional License which includes the following conditions in addition to the [already agreed-upon] conditions:

“1. Beer and malt liquor shall not be sold in containers of greater than 16 ounces or in units of less than a six-pack.

“2. Wine shall not be sold in bottles smaller than 750 ml., and wine coolers shall not be sold in units of less than a four pack.

“3. There shall be no cups, glasses, or similar receptacles commonly used for drinking of beverages sold, furnished, or given away at the petitioner’s premises in quantities of less than twenty-four in their original multi-container package.

“4. All ice shall be sold at or about prevailing prices in the area and in quantities of not less than five pounds per sale.” (Determination of Issues XV-B.)

Applicant has now submitted with its appeal brief a declaration of Beth Aboulafia accompanying certified copies of Resolution No. PC-2001-23 of the Rocklin Planning Commission, dated April 17, 2001, and of Resolution No. 2001-252 of the Rocklin City Council, dated July 24, 2001. The Planning Commission denied the application of a conditional use permit for a McDonald’s fast-food restaurant in the Longs Drug Shopping Center, the site involved in this matter,, and the City Council upheld the Planning Commission’s denial. It is applicant’s contention that the effect of these resolutions is to eliminate the basis for the ALJ’s concerns, as well as eliminate the need for the additional four conditions.

Business and Professions Code §23085 empowers the Appeals Board, where it finds that there is relevant evidence, which, in the exercise of reasonable diligence,

could not have been produced before the Department, to remand the matter to the Department for reconsideration in the light of such evidence. Board Rule 198 (4 Cal. Code. Regs. §198) requires that such a request for the consideration of such evidence be submitted in the form of an affidavit or declaration setting forth the substance of the newly-discovered evidence, its relevance, the nature of any exhibits to be introduced, and a detailed statement of the reasons it could not have been produced at the Department hearing.

Here, the new information on its face reveals that it did not come into existence until after the hearing had concluded. Indeed, McDonald's was not even perceived as an issue in the hearing itself. In our review of the 387 pages of the hearing transcript, we found only a single reference (I RT 90) to McDonald's, and that in a passing comment by one of the protestants about traffic.

It is obvious that this new information is relevant and material. If there is to be no McDonald's at the center, as the exhibits to the Aboulafia declaration appear to demonstrate, the reasons for the ALJ's concerns are non-existent, and there is no rational basis for the four new conditions.

We note that, at the hearing, Department counsel advised the Board that the Department did not oppose the appeal.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be necessary in light of our comments herein.³

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

³ 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.