

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

AB-7885

File: 41-366325 Reg: 01050483

ZANKEL RESTAURANT GROUP ONE, INC. dba The Grove
2250 Chestnut Street, San Francisco, CA 94123,
Appellant/Applicant

v.

EDMON S. DELMON, et al., Respondents/Protestants,
and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED SEPTEMBER 12, 2002

This is an appeal by Zankel Restaurant Group One, Inc., doing business as The Grove, from an order of the Department of Alcoholic Beverage Control which granted its application for the transfer of an on-sale beer and wine public eating place license to expand licensed premises at 2250 Chestnut Street to include outdoor dining areas on Chestnut Street and Avila Street, and overruled protests thereto, on the condition that appellant accept certain additional conditions to those on the petition for conditional license.¹ Appellant has specifically limited its appeal to the condition set forth in Determination VI (b) of the decision.² (See text, infra, page 3.)

¹ A copy of the decision of the Department, dated September 13, 2001, is set forth in the appendix.

² In its notice of appeal, submitted in letter format, and dated December 12, 2001, appellant states that "In all other additional conditions the petitioner hereby
(continued...)

Appearances on appeal include Zankel Restaurant Group One, Inc. (“applicant”), appearing through its counsel, Glenn P. Zwang and Jae S. Yi; protestants Edmon S. Delmon, Konrad Krause, Marc Martini, Arthur Guerrazi, and Claude Martini; and the Department of Alcoholic Beverage Control (“the Department”), appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Applicant operates a restaurant located at the corner of Chestnut and Avila Streets in the City of San Francisco. On May 2, 2000, it filed an application for the transfer of an on-sale beer and wine public eating place license, to expand its existing licensed premises³ by the addition of outside dining areas on both Chestnut Street and Avila Street.

Protests were filed against the application, citing concerns about bodily wastes in garage entrances, loitering, noise, traffic problems, sidewalk congestion, vandalizing by inebriates, and interference with residential quiet enjoyment. Two of the five protestants, Claude and Marc Martini, reside within 100 feet of the proposed premises.

On February 16, 2001, applicant filed a Petition for Conditional License, acknowledging that issuance of an unrestricted license would be contrary to welfare and morals as defined in Section 22 of Article XX of the California Constitution, and that the premises were located within 100 feet of residences. The petition set forth twelve

²(...continued)
accepts those conditions and submits this letter as its Petition to acceptance of those matters.”

³ Applicant was licensed on July 22, 1999, for the indoor portion of the restaurant premises. That portion of the premises had been previously licensed to another licensee since August 1994. On May 23, 2001, the Department issued applicant an interim retail permit allowing the sale of beer and wine in the outdoor dining areas.

conditions, covering such topics as: a ban of sales of alcoholic beverages for consumption off the premises; a prohibition of any exchange for a public premises type license; control of litter; the prohibition of a bar or lounge area; quarterly sales of alcoholic beverages not to exceed the gross sales of food for the same period; the sale, service, or consumption of alcoholic beverages permitted only between the hours of 12:00 noon and 11:00 p.m. each day of the week; compliance with the provisions of the Department of Public Works tables and chairs permit; a limitation on the size of the Avila Street outdoor patio area; and a minimum of six feet pedestrian sidewalk clearance at all times.

A protest hearing was conducted on June 28, 2001, following which the Department adopted the proposed decision of the Administrative Law Judge which overruled the protests on the condition that the applicant accept three additional conditions deemed by the ALJ essential to the protection of welfare and morals:

“(a) Sale, service or consumption of alcoholic beverages shall be permitted in the outdoor dining areas only between 12:00 noon and 9:00 p.m. each day of the week.

“(b) Seating on the sidewalk bordering Avila Street shall be limited to one or more benches permanently affixed to the building in the same manner as required by the San Francisco Public Works Permit (see Exhibit 4, Conditions 7 and 10) for the sidewalk dining area bordering Applicant’s premises on Chestnut Street.

“(c) The outdoor patio area on Avila Street shall be regularly policed by the Applicant to ensure pedestrian traffic is unimpeded.”

Appellant challenges only the condition which requires permanently affixed benches. In so doing, it implicitly concedes a nexus between the conditions restricting hours of operation and ensuring that pedestrian traffic is unimpeded with the perceived problem - residential quiet enjoyment. Appellant contends that there is not substantial

evidence that the tables and chairs in its outdoor dining area on Avila Street have impeded pedestrian traffic in any way.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would not be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 775.) "[T]he Department's role in evaluating an application for a license to sell alcoholic beverages is to assure that the public welfare and morals are preserved 'from probable impairment in the future.'" (*Kirby v. Alcoholic Beverage Control Appeals Board (Schaeffer)* 7 Cal.3d 433, 441 [102 Cal.Rptr. 857, 498 P.2d 1105.])

The Department may impose "reasonable conditions" on a license under the authority of Business and Professions Code §23800, subdivision (a), which provides that "If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions" the Department may grant the license subject to those conditions. Section 23801 states that the conditions "may

cover any matter . . . which will protect the public welfare and morals"

We view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"⁴ in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The problem perceived by the ALJ is described in Determination of Issues III:

"Evidence established that the outdoor dining area of Applicant's restaurant as it exists on Avila Street does presently interfere with pedestrian sidewalk usage.

"While Applicant appears at the beginning of each business day to organize the tables and chairs on the Avila Street sidewalk area in a manner which may not interfere with pedestrian traffic, as the day progresses it was established that customers often rearrange the chairs so as to impede pedestrian usage of the sidewalk. If the applied for license is granted without additional conditions, it is reasonable to assume the problem will worsen as business activity increases at the proposed premises due to the availability of beer and wine. The adverse impact of this increased business activity will increase foreseeably during the summer months."

Admittedly, there is some evidentiary support for this finding in the testimony of protestant Delmon, and that of protestant Martini. In addition, photographs taken by Martini show sidewalk congestion on two occasions in February and July, 2001 (Exhibits I-1 through I-4).

However, there is also evidence to the contrary, from the testimony of the Department investigator, of the owner of the restaurant, of a neighboring restaurant owner, and of a patron, all to the general effect that any blockage from movement of tables and chairs was infrequent and did not interfere with pedestrian movement.

Protestants also expressed concern about motorcycles parked on the sidewalk

⁴ See Webster's Third New International Dictionary, 1986, page 1524.

on Avila Street, and baby carriages parked there while mothers enjoyed morning coffee. It is not clear how the removal of chairs and tables and their replacement with permanently affixed benches would alleviate this problem. However, the more general condition, obligating applicant to regularly police the outdoor patio on Avila Street to ensure pedestrian traffic is unimpeded, is clearly directed at this problem. By the same token, the more general condition would also protect the free passage of pedestrians.

It seems to us that, given the evidence that pedestrian traffic congestion is not a common occurrence, and appellant will be under a continuing obligation to police the area on a regular basis to ensure that pedestrian passage is unimpeded, it is unreasonable on the part of the Department to add the further, more restrictive, condition precluding applicant from continuing its use of tables and chairs in the Avila Street patio area. The evidence that the chairs or tables, by themselves, impede pedestrian traffic is, in light of the entire record, not enough, we think, to justify the restriction imposed by the condition under attack.

We must assume that, if applicant does not comply with the condition to police the area and take appropriate action, when necessary, to remove impediments to pedestrian access, and legitimate complaints are registered with the Department, the Department is free to take appropriate enforcement action. But, at present, the evidence, viewed in light of the entire record, is not of the nature and quality which we would consider substantial evidence of the kind required to support the proposed imposition on applicant's style of operation.

ORDER

The decision of the Department is reversed and the case is remanded to the

Department for further proceedings consistent with our comments herein.⁵

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

⁵ 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.