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

AB-8053
File: 41-382158 Reg: 02053296

JAMES LISSNER, Appellant/Protestant

v.

BOBO'S CHINESE DELI, INC., dba Bobo's Chinese Palace
934 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: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 8, 2003

James Lissner (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Bobo's Chinese Deli, Inc., doing business as Bobo's Chinese Palace, for an on-sale beer and wine public eating place license.

Appearances on appeal include appellant/protestant James Lissner; respondent/applicant Bobo's Chinese Deli, Inc., appearing through its counsel, C. Stephanie Chen; 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 November 7, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant applied for an on-sale beer and wine public eating place (type 41) license on October 18, 2001. Protestant and three others filed protests against the issuance of the applied-for license. On February 9, 2002, applicant petitioned the Department for issuance of the license with conditions, and the Department investigator assigned to review the application recommended the petition be granted.[2] An administrative hearing was held on October 1, 2002, at which time documentary evidence was received, and testimony was presented by Department investigator Tonya Meadows, protestant James Lissner, applicant's vice president and manager Steven Deng, and two of applicant's customers.

Subsequent to the hearing, the Department issued its decision which overruled or dismissed the protests, allowing the conditional license to issue.

Protestant thereafter filed a timely notice of appeal in which he raises the following issues: 1) The finding of public convenience or necessity is not supported by substantial evidence in light of the whole record; 2) the decision is unenforceable and deprives protestant and the community of their right to due process; and 3) the Department's definition of public convenience or necessity is unconstitutionally vague, depriving protestants and applicants of their right to due process.

DISCUSSION

I

Protestant contends the determination that granting the license would serve public convenience or necessity is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

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[2]The Department issued an interim permit to applicant in June or July of 2002.

Business and Professions Code[3] section 23958 provides that the Department "shall 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." The Department may issue a license in spite of the existence of undue concentration "if the applicant shows that public convenience or necessity would be served by the issuance." (Bus. & Prof. Code, §23958.4, subd. (b)(1).)

The parties stipulated that the premises is located in an area of undue concentration as defined in section 23958.4. (Finding VIII.) Finding V of the Department's decision states:

> Petitioner restaurant is family-dining Chinese restaurant located in a "high-tourist", downtown commercial area of Hermosa Beach. Most of the [restaurant's] customers are local residents. More than 150 of Petitioner restaurant's customers wrote letters or signed petitions supporting the restaurant's application for an alcoholic beverage license, many expressing their preference to have an alcoholic beverage with their meals.

The decision also states that these facts "support a determination that public convenience or necessity would be served by the issuance of an alcoholic beverage license to Petitioner restaurant." (Det. of Issues II.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole

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[3]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] *(Lacabanne*); *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Protestant argues that the finding by the administrative law judge that the premises offers "family-dining" is "irrelevant" since there is nothing that compels the applicant to offer any particular kind of dining at any particular time and "family-dining" is available at other restaurants in the area.

The ALJ considered the exhibits and the testimony of the witnesses, and concluded that applicant's offering of a family-dining type of Chinese restaurant was an appropriate factor satisfying public convenience or necessity. He correctly stated that the existence of other Chinese restaurants in the area "does not negate the facts which support this determination." (Det. of Issues II.)

Protestant is incorrect in stating that there is no restriction on this license as to type of food or hours of food service. While nothing restricts the restaurant to a particular ethnic cuisine, every public eating place license, such as that applied for here, must comply with Section 23038, which requires that actual meals be served "regularly and in a bona fide manner."

Protestant objects to the finding regarding patrons desiring to have an alcoholic beverage with their meals as "a general statement that would be true in most parts of the State." However, the finding refers specifically to the comments of the premises' customers.

Protestant also asserts that a finding that the premises are located in a "high-tourist" area does not support the determination because there was no statistical information presented as to the demand for restaurant services. Statistical evidence is not necessary, however. It was sufficient for the investigator to testify, based on her personal and official knowledge of the area, that it is a heavily traveled tourist area, particularly where that testimony was not objected to.

Contrary to protestant's assertion, there is no conflict between finding the restaurant to be located in a high-tourist area and also finding that most of the restaurant's customers are local residents. One has to do with location contributing to potential customers for this and other restaurants, the other with current patrons of this restaurant.

Protestant also argues that "The lack of objection by local law enforcement does not establish the affirmative concept of 'public convenience or necessity'." While that may be true, it does not negate that concept.

There was substantial evidence supporting the findings and the findings support the determination of the Department that public convenience or necessity would be served by issuance of the license.

II

Protestant contends the decision deprives him and the community of their right to due process and is contrary to public welfare and morals. The decision violates due process, according to protestant, 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, protestant argues, because there is nothing to prevent removal of the condition prohibiting live entertainment and dancing 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.

Protestant is arguing about something that has not happened yet and may never happen. In any case, notice is provided to the community, at least technically, because section 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. Protestant's remedy then, lies with the local governing body.

The Board has previously rejected this due process argument in several of protestant's earlier appeals. (See, e.g., *Lissner v. Miller* (2002) AB-7816; *Lissner v. Pierview, LLC* (2001) AB-7650.) No evidence or argument has been presented that would cause us to decide this matter differently from the previous ones.

III

Protestant contends the Department's definition of public convenience or necessity is unconstitutionally vague and therefore deprives applicants and protestants of their right to notice, violates due process, and is void as a matter of law.

This is essentially an attack on the constitutionality of sections 23958 and 23958.4, both of which use, without definition, the term "public convenience or necessity." The California Constitution, article III, section 3.5, prohibits an administrative agency, such as the Appeals Board, from holding an Act of the Legislature unconstitutional except in specified circumstances, none of which are present here. Consequently, the Board should decline to consider this issue.

We note, however, that protestant has made similar attacks on "public convenience or necessity" in prior cases, contending that use of the term without a specific definition made the Department's decision arbitrary and capricious. This Board has consistently rejected this argument when considering it on the merits. A full discussion of the issue was included in the Board's decision in *Vogl v. Bowler* (1997) AB-6753. The Board rejected protestant's contention there, and we do so again here.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.