

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

AB-8120

File: 47-391774 Reg: 02054143

JAMES LISSNER, Appellant/Protestant

v.

STEVEN PENDELTON DELK, dba London Underground Grill & Pub
1332 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 2, 2003
Los Angeles, CA

ISSUED JANUARY 20, 2004

James Lissner (appellant/protestant) appeals from the decision of the Department of Alcoholic Beverage Control¹ granting the person-to-person and premises-to-premises transfer of an on-sale general public eating place license to Steven Pendelton Delk (respondent/applicant), doing business as London Underground Grill & Pub.

Appearances on appeal include appellant James Lissner; respondent Steven Pendelton Delk, appearing through his counsel, Thomas Hanrahan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

¹The decision of the Department, dated March 13, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On August 20, 2002, respondent applied to the Department for the person-to-person and premises-to-premises transfer to him of an on-sale general public eating place license. Protests were filed opposing the application. Respondent petitioned the Department for issuance of the license with conditions on November 18, 2002. The Department investigator assigned to this application recommended that the license be issued as conditioned.

At the administrative hearing on the protests, held on February 14, 2002, documentary evidence was received and testimony concerning the application was presented by Department licensing representative Cynthia Ibarra. James Lissner, the only protestant attending the hearing, testified regarding the basis for his protest. The other three protestants did not appear in person or by a representative, and their protests were dismissed.

Following the hearing, the Department issued its decision overruling the protest. The protestant, appellant in this action, filed an appeal contending: 1) The Department's decision does not include a determination of public convenience or necessity, and 2) the Department's decision is contrary to public welfare and morals and deprives appellant and the community of their rights to due process of law.

DISCUSSION

I

Appellant contends, without any supporting explanation or argument, that the decision is contrary to law because it does not contain a determination of public convenience or necessity, as required by Business and Professions Code section 23958.4, subdivision (b)(1).

The applicant premises was previously licensed as an on-sale general public eating place and operated as such until July 17, 2002. Respondent applied for the license transfer on August 20, 2002, slightly more than 30 days after the prior licensee had ceased operation. Section 23958.4, subdivision (f) provides that the other subdivisions of section 23958.4, including the provisions regarding public convenience or necessity found in subdivision (b)(1), do not apply if the premises was licensed and operating with the same type of license within 90 days of the application's filing.

The administrative law judge (ALJ) found, in this regard (Finding VIII):

Mr. Delk's restaurant was previously licensed with a Type 47 license. The prior licensee surrendered his license on or about July 17, 2002. On his License Action Request document (ABC Form 231), the prior licensee indicated that his business would close on July 22, 2002. Under these circumstances, it is reasonable to conclude that the premises under the prior licensee were licensed and operated with a Type 47 license until July 17.

Because the premises, within 90 days of Mr. Delk's application, were licensed and operated with the same type license for which Mr. Delk applies, neither the issue of "undue concentration" of licenses, nor the issue of residences within 100 feet of the premises, applies. Business and Professions Code Section 23958.4(f) and Title 4, California Code of Regulations, Section 61.4(b).

The ALJ's analysis is correct. No determination of public convenience or necessity was required in this instance.

II

Appellant 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 appellant, because once the license is issued, conditions can be removed without notice to the public and an opportunity for objections to be heard.

The decision is contrary to public welfare and morals, appellant argues, because there is nothing to prevent removal of the conditions on the license. The application for conditional license states that it would be contrary to public welfare and morals for the license to issue without conditions. Appellant alleges that "there have been numerous instances of the administrative removal of license conditions" in Hermosa Beach. He notes that he was personally notified of some of the requests to remove conditions, but there was no notification of the general public. The requests for removal of conditions, appellant asserts, were granted. A petition for modification of the conditions on respondent's license, appellant fears, "is easily anticipated."

Appellant 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. Appellant's remedy then, lies with the local governing body.

The Board has previously rejected this due process argument in several of appellant's prior 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.

ORDER

The decision of the Department is affirmed.²

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

²This 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.