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

AB-8322a
File: 40-396500 Reg: 04056514

IMELDA CASTELLANOS and RAUL M. CASTELLANOS, dba Rack & Cue Billiards
18615 Sonoma Highway, Space 220, Boyes Hot Springs, CA 95476,
Appellants/Applicants

v.

RICHARD D. ARENDT, ET AL.,
Respondents/Protestants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 11, 2007
Sacramento, CA

ISSUED APRIL 24, 2007

Imelda Castellanos and Raul M. Castellanos, doing business as Rack & Cue Billiards (appellants/applicants), appeal from a Decision Following Appeals Board Decision of the Department of Alcoholic Beverage Control[1] which denied their application for issuance of an on-sale beer license.

Appearances on appeal include appellants/applicants Imelda Castellanos and Raul M. Castellanos, appearing through their counsel, Beth Aboulafia; respondents/ protestants Richard D. Arendt, et al.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated June 15, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants applied for issuance of an on-sale beer license on or about January 10, 2003. They operate a pool hall, with a dozen pool tables and a small fixed bar, on the second floor of a small strip mall. They wish to be able to sell beer to their patrons along with soft drinks and snacks.

Protests were filed against issuance of the license, and the Department conducted an investigation. It concluded the application should be denied on the bases that issuance would create or add to law enforcement problems, the proposed premises is located in an area of undue concentration based on crime statistics, and operation of the business would interfere with the residences of the 17 protestants. After an administrative hearing, the Department issued its decision which denied applicants' petition for issuance of the license because the proposed premises is in an area of undue concentration and applicants failed to demonstrate that public convenience or necessity would be served by issuance of the license. The protests were sustained on the issue of undue concentration and all the other protest issues were dismissed.

Appellants filed an appeal with this Board, which concluded that the Department acted arbitrarily in denying the application because the findings did not support the critical determinations in the decision. The Board remanded the matter to the Department for further proceedings, and the Department remanded the case to the administrative law judge (ALJ). The ALJ limited the issue to be resolved to whether the applicants had established that issuance of the license would serve public convenience or necessity and the parties submitted written argument. The Department adopted the ALJ's proposed decision that again denied applicants' petition for failure to demonstrate that public convenience or necessity would be served by issuance of the license.

Appellants filed this appeal contending that the Department erred and acted arbitrarily in determining that they failed to show public convenience or necessity.

DISCUSSION

I

Business and Professions Code[2] section 23958 provides, in part, 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." Where undue concentration exists, a license may still be granted if the applicant shows that public convenience or necessity would be served by issuance of the license. (Bus. & Prof. Code, § 23958.4, subd. (b)(2).) Undue concentration was found to exist in the present case, making issuance of the license dependent upon appellants' showing that public convenience or necessity would be served by issuance of the license.

The Department's decision following the remand is identical to its previous decision except for the addition of seven paragraphs (IV-X) in the Determination of Issues, under the heading "Undue Concentration." Paragraphs IV through the first paragraph of VII simply describe the holdings in *Sepatis v. Alcoholic Beverage Control Appeals Board* (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729] (*Sepatis*) and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367] *(Diez*).

Sepatis is cited for the principle that "public convenience or necessity" means something more than just the number of licensed premises available (pp. 98, 101), such as the character of a particular premises, its attractiveness, the kind of business and

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

the probable manner in which it will be conducted, and the type of guests who will patronize the establishment (p. 101). The court in *Sepatis* reversed the decision of the Appeals Board and upheld the Department's decision to grant a license in an area of undue concentration based on the Department's finding that public convenience or necessity would be served by issuance of the license.

The present decision quotes from *Diez* (133 Cal.App.3d at p. 820):

> [I]t is not necessary in every instance to introduce specific evidence reestablishing the very fact that presumably led to the adoption of Rule 61.3[3] in the first instance, i.e., that there is a symbiotic relationship between crime and the increased consumption of alcohol in a given locale that results from an excessive number of competing sources of distribution.

The quotation, however, is from the court's discussion of what evidence was required to support denial of a license for undue concentration under Department rule 61.3. The Department determined in *Diez* that the applicant had not shown public convenience or necessity would be served by issuance of the license, even though the proposed premises carried "a unique variety and assortment of Cuban grocery items," where there were nearby licensed grocery stores. (133 Cal.App.3d at p. 819.) The Court of Appeal upheld the Department's determination that neither public convenience nor necessity were shown, saying that "the Department fully exercised its judgment and discretion." (133 Cal.App.3d at p. 821.)

Following the discussion of *Sepatis* and *Diez*, the Department's decision turns to the facts of this case:

> VII [¶] . . . [¶] In support of their application, applicants' letter dated January 14, 2003, applicants describe the nature of their planned

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[3]Although not repealed, rule 61.3 (4 Cal. Code Regs., §61.3) was superceded by the enactment of section 23958.4, effective January 1, 1995.

operation. They assert they carefully screen the ages of their customers and monitor purchases made by any one patron. By being able to sell beer in the premises, they can better limit purchases of beer and control a family atmosphere. Applicants wrote they are interested in maintaining their high standards and reputation for providing quality family entertainment. The sale of beer has been requested by patrons and will provide sufficient income to meet their rent commitment. This is a family operated business.

VIII Based upon its investigation of the site, contact with the local law enforcement agency and this letter, the Department, exercising its constitutional authority, concluded that applicants had not established that granting of the license would serve "public convenience and necessity" and denied the application. At hearing, applicants explained in greater detail how granting of their application would result in serving "public convenience or necessity." Those matters are set forth in Findings VII, VIII and XII. Basically, applicants will offer entertainment provided by pool tables and televised sporting events. This is not a restaurant. Snack foods will be offered, though it is possible that a variety of sandwiches will be available in the future. The license, if issued, will authorize the presence of minors in the premises. Applicants have not petitioned for conditions nor has the Department recommended any.

IX The evidence shows that there are five licensed premises within 1,000 feet of the proposed premises. Of these, three have on-sale licenses. These include a Mexican taqueria within the same shopping center and a pizza shop and Thai food restaurant within 1,000 feet of the proposed premises. The population within this tract is 9,277. Fifteen licenses are permitted based thereon. Applicants argue that the area is underserved. By the same token, the average number of offenses per crime reporting districts [sic] in this county totals 22.37 whereas the total offenses in this particular crime-reporting district numbers [sic] 64 or almost three times the average.

X Considering the nature of the operation, the nature of the license, the lack of conditions sought and the high crime reporting figures emanating from this crime reporting district, the Department's concern regarding the issuance of this license is within reason, and its denial is not an abuse of discretion (see Determination VI above and the *Diez* reference). It may be that these factors are not as potent as those discussed in *Sepatis* and *Diez*. The *Sepatis* decision, however, was not intended to provide "a definitive interpretation of the disputed phrase" (public convenience or necessity). (pg. 103). "Where the decision is the subject of choice within reason, the department is vested with the discretion of making the selection which it deems proper. . . ." (*Koss v. Department of Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 495).

Appellants contend the determination that they failed to demonstrate public convenience or necessity is erroneous and arbitrary because it is based on factors not relevant to determining public convenience or necessity, the factors relied upon do not support the determination, and other factors that the Department did not consider support a determination that appellants demonstrated public convenience or necessity.

The Appeals Board is bound to follow certain standards in reviewing a decision of the Department:

"[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 is authorized by the California Constitution to exercise its discretion to deny an alcoholic beverage license, if the Department reasonably determines for "good cause" that the granting of such license would 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.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but

is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (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].)

A number of issues were considered by the Department in its original decision, including whether issuance of this license would create or add to a law enforcement problem, interfere with the nearby residents' quiet enjoyment of their property, create a traffic problem, and add to an undue concentration of licenses. Each one of these was rejected by the Department as a reason for denying the license except for undue concentration. The sole basis for denying the license, therefore, rested on the finding that appellants had not demonstrated that public convenience or necessity would be served by issuance of the license. In this re-appeal, the only question is whether the Department acted arbitrarily in determining that appellants failed to show public convenience or necessity.

In the prior appeal of this case, the Board addressed the problems that have arisen in trying to apply the term "public convenience or necessity":

> Department findings have been challenged before due to the lack of a definition for public convenience or necessity, and this Board has rejected such attacks where the licensee has successfully shown the existence of public convenience or necessity and thus qualified for a

> license in an area of undue concentration.[4] However, the lack of a definition or standard becomes more troublesome when an application is denied.
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> The court in *Sepatis*, *supra*, upheld the Department's exercise of discretion in granting a license to a bar in an area of undue concentration in San Francisco where the Department held that the license would serve public convenience or necessity because it " 'will appeal to all segments of the community including many residents and business people in the area who are presently reluctant to enter other bars in the vicinity.' " (*Sepatis*, *supra*, 110 Cal.App.3d at p. 97.) The court in its discussion noted that, "The real problem stems from the fact that neither the statute nor the Department's rules contain any definition of the term 'public convenience or necessity' as that term is used in section 23958, nor do they indicate just what criteria (apart from criteria relevant to determination of 'undue concentration') are denoted by that concept." (*Id*. at p. 99.)
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> The court held that, in making a determination as to public convenience or necessity, "matters of aesthetics and predicted mode of operation are not beyond [the Department's] reach in exercising its discretionary powers." (*Sepatis*, *supra*, 110 Cal.App.3d at p. 101.) It also warned, however, that when the Department determines public convenience or necessity based on the character of a premises or the segments of the public to whom the premises might appeal, "the denial of a license for *failure* of the applicant to show public convenience or necessity, might well give rise to meritorious claims of arbitrary administrative action," unless the Department adopts "standards susceptible of meaningful review." (*Id*. at p. 100, original italics.)
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> Here, we lack both a meaningful standard of review for what constitutes "public convenience or necessity" in general, and a meaningful statement of how appellants failed to meet that standard. It is as if the Department were saying to the applicants, "You must show how public convenience or necessity will be served by issuing this license, but you have to guess what public convenience or necessity means, and if you don't get it right, we don't have to tell you, or the Appeals Board or the courts, what was lacking; you can read what you wrote and figure it out."

In the prior appeal in this case, the Board held that the Department acted arbitrarily in denying the license, because the findings did not obviously support the determination and no analysis or explanation was provided to show why public convenience or necessity had not been shown.

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[4]See, e.g., *Lissner v. Picetti* (2002) AB-7794; *Vogl v. Bowler* (1997) AB-6753.

Although seven paragraphs were added to the decision after remand, we are still no closer to an understanding of how appellants failed to show public convenience or necessity would be served by issuing the license. The "discussion" of the facts is simply a listing, in almost random order, of the evidence presented. Nowhere is there a statement of the implications the Department draws from this collection of facts; rather, we are left to infer that the facts were somehow deficient based on the ultimate conclusion that appellants failed to show that public convenience or necessity would be served by issuance.

The first sentence of VIII states:

> Based upon its investigation of the site, contact with the local law enforcement agency and this letter, the Department, exercising its constitutional authority, concluded that applicants had not established that granting of the license would serve "public convenience and necessity" and denied the application.

This statement appears to be an explanation for the determination that appellants failed to show public convenience or necessity; in reality, it is so non-specific that it raises more questions about what was considered than it answers. In addition, the statement is not supported by the record since both the investigator's testimony and his report reveal that the Department's conclusion regarding public convenience or necessity was based only on appellants' letter and the protests.

The first sentence of X also appears to be attempting to justify the Department's decision:

> Considering the nature of the operation, the nature of the license, the lack of conditions sought and the high crime reporting figures emanating from this crime reporting district, the Department's concern regarding the issuance of this license is within reason, and its denial is not an abuse of discretion (see Determination VI above and the *Diez* reference).

Once again, however, the enumerated considerations are so broad and undefined that they are not helpful. Perhaps more importantly, the sentence does not even address public convenience or necessity. Rather, it purports to explain the Department's *concern* about issuing this license, something that is not mentioned elsewhere in the decision.

The decision, and the Department's belated appeal brief, seem fixated on the crime statistics. The crime figures are, if not irrelevant, at least peripheral to the only question to be answered here: whether the Department acted arbitrarily in determining that appellants failed to show public convenience or necessity. The crime figures may show a law enforcement problem, but the decision holds that issuance "will not aggravate a police problem." (Det. XV.) They may show undue concentration, but that is already established and it is separate from a consideration of public convenience or necessity. (See *Sepatis*, *supra*.)

In spite of the broad discretion given to the Department, it must act reasonably in determining that issuance of a license would be contrary to public welfare and morals. We can only look to the language of the Department's decision to determine if it has acted reasonably. In this case, even after two tries, the Department has acted arbitrarily in concluding that appellants failed to show public convenience or necessity. As we said in the first appeal,

> It may be there is a legitimate reason for rejecting appellants' petition, but this decision does not provide the requisite basis for reaching such a conclusion, because the findings do not support the critical determinations. With no analysis or explanation, we can only conclude that the Department has acted arbitrarily in denying this application.

ORDER

The decision of the Department is reversed, and the matter is remanded to the Department for such further proceedings as are necessary and appropriate in light of the foregoing discussion.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.