

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

AB-8361a

File: 47-350965 Reg: 04056646

INLAND PACIFIC INVESTMENTS, LLC dba Carlos O'Briens
440 West Court Street, San Bernardino, CA 92401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 1, 2006
Los Angeles, CA

ISSUED OCTOBER 6, 2006

Inland Pacific Investments, LLC, doing business as Carlos O'Briens (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its license suspended for 10 days, and indefinitely thereafter until one of the following two events takes place: (1) appellant signs and delivers a new petition for conditional license adding a condition that the sale and service of alcoholic beverages shall only be allowed between 11:00 a.m. and 11:00 p.m.; or (2) appellant exchanges its current on-sale general bona fide public eating place license for an on-sale general license. The order was entered following the Board's partial reversal and remand of the Department's original order. The Board sustained the Department's finding of violations

¹The Department's Decision following Appeals Board decision, dated December 27, 2005, is set forth in the appendix.

of Business and Professions Code section 23396² and 23038,³ charged in count 4 of the accusation.

Appearances on appeal include appellant Inland Pacific Investments, LLC, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

DISCUSSION

The present appeal follows the Board's partial reversal of the Department's original order. In remanding the case to the Department, the Board stated:

Although it would appear to this Board that the findings in count 4 alone would be sufficient justification for the penalty - one that effectively forces appellant to operate either as a restaurant, or as a bar where minors are not permitted, we

² Section 23396 provides:

Any on-sale license authorizes the sale of the alcoholic beverage specified in the license for consumption on the premises where sold. No alcoholic beverages, other than beers, may be sold or served in any bona fide public eating place for which an on-sale license has been issued unless the premises comply with the requirements specified in Section 23038, 23038.1, or 24045.1.

³ Section 23038 provides:

'Bona fide public eating place' means a place which is regularly and in a bona fide manner used and kept open for the serving of meals to guests for compensation and which has suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals, the kitchen of which must be kept in a sanitary condition with the proper amount of refrigeration for keeping of food on said premises and must comply with all the regulations of the local department of health. 'Meals' means the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals only as sandwiches or salads shall not be deemed a compliance with this requirement. 'Guests' shall mean persons who, during the hours when meals are regularly served therein, come to a bona fide public eating place for the purpose of obtaining, and actually order and obtain at such time, in good faith, a meal therein. Nothing in this section, however, shall be construed to require that any food be sold or purchased with any beverage.

think it appropriate to remand the case to the Department and let the Department tell us whether it agrees with our surmise. While the impact on its present mode of operation may be substantial, appellant has no basis to complain. We find nothing about the penalty to be so out of the mainstream as to constitute cruel and unusual punishment.

Appellant now contends that the Department has misconstrued and unconstitutionally amended the provisions of Business and Professions Code section 23038 regarding the criteria established for the operation of a bona fide eating place, and that the penalty constitutes cruel and unusual punishment.

Appellant's challenge to the Department's decision raises the same issues the Board addressed in its initial decision in this case. Appellant had asserted, among other things, that the Department's decision was not supported by the findings and the findings were not supported by substantial evidence. Appellant makes the same claim in its brief on this appeal. Appellant also contended in its first appeal that, as to count 4, it had, at all times the premises were investigated, an open and functioning kitchen with the equipment and means for preparing a full assortment of meals. Finally, appellant renews its earlier contention that the penalty constitutes cruel and unusual punishment.

Referring to the extensive findings of fact relied upon by the administrative law judge (ALJ) (Findings of Fact 17 through 33), which the Board included in an addendum to its decision, the Board stated:

There is ample support in the record for the Department's decision sustaining count 4 and the findings upon which it is based. The records appellant produced (Exhibit 5 and 5-A) appear to have been manufactured from whole cloth; its business hours (not opening until 9:00 p.m.) are inconsistent with a bona fide eating place operation; its promotional literature (Exhibit 7) holds itself out as a dance club, omitting any mention of food; its "weekly lineup" offers such non-food lures as several varieties of music, a "\$500 sexy dance" contest, a "wet T-shirt" contest; it used imaginative accounting to create the illusion of food sales by carving out a portion from the admission fee; the creation of a buffet

table featuring salad, chips and salsa (see Exhibit 4-C) was a device to substitute for the meal service required by the statute.

The California Supreme Court observed long ago, in *Covert v. State Board of Equalization* (1946) 29 Cal.2d 125, 134-135 [173 P.2d 545]:

It is true, of course, that a restaurant would not be bona fide if it were created or operated as a mere subterfuge in order to obtain the right to sell liquor. There must not only be equipment, supplies, and personnel appropriate to a restaurant, together with a real offer or holding out to sell food whenever the premises are open for business but there must also be actual and substantial sales of food.

The evidence overwhelmingly supports the decision, and its very nature explains why the ALJ arrived at the penalty he proposed. It comes as little surprise, then, that the Department elected to impose the same penalty as it had when it first heard the case. Indeed, the Board anticipated such action when it stated, in dicta, its belief “that the findings in count 4 alone would be sufficient justification for the penalty - one that effectively forces appellant to operate either as a restaurant, or as a bar where minors are not permitted.”

The Board could well itself have sustained the penalty rather than remanding it to the Department for reconsideration. (See *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 635 [166 Cal.Rptr. 826].) That it did not does not give rise to any ground upon which to challenge the Department’s decision, in the exercise of its discretion, to reimpose the same penalty.

Appellant’s contention that the Department misconstrued and unconstitutionally amended the provisions of section 23038 could have been raised in its initial appeal. It did not do so, instead choosing to challenge the sufficiency of the evidence and the findings. We consider the issue to have been waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal §394, p. 444, and cases cited therein.)

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.