

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

**AB-8369**

File: 21-405365 Reg: 04057794

MUHAMMAD LATIF, dba Cigarettes for Less  
2370-C West Cleveland, Madera, CA 93637,  
Appellant/Applicant

v.

SURINDER S. ATHWAL, ET AL.,  
Respondents/Protestants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: October 6, 2005  
San Francisco, CA

**ISSUED: DECEMBER 12, 2005**

Muhammad Latif, doing business as Cigarettes for Less (appellant/applicant) appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which denied his application for an off-sale general license.

Appearances on appeal include appellant/applicant Muhammad Latif, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan Kroll; respondents/protestants Surinder S. Athwal, et al.,<sup>2</sup> appearing through their counsel,

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<sup>1</sup>The decision of the Department, dated December 23, 2004, is set forth in the appendix.

<sup>2</sup>Not all the protestants were present at the administrative hearing, but protestants' counsel stated that he represented all the protestants. Several of the protestants testified during the hearing: Gilbert (or Gir) Soto, Gamdur S. Brar, Surinder S. Athwal, Lori Pond, and Kewal Bains. The remaining protestants were not named

(continued...)

Lawrence M. Adelman; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

#### FACTS AND PROCEDURAL HISTORY

On April 13, 2004, applicant filed an application for an off-sale general license.<sup>3</sup> Protests were filed by respondents, and an administrative hearing was held on September 29, 2004. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Department investigator Mary Jennings testified about her findings during her investigation of the application. The proposed premises is located in a small shopping strip mall in Madera along a heavily traveled four-lane portion of West Cleveland Avenue, which runs along the north side of the mall. North Schnoor Avenue borders the east side of the mall, with the Madera County Fairgrounds on the other side of that street. The west side of the mall, where the proposed premises is situated, is bounded by Stephanie Lane. Beyond Stephanie Lane is a large vacant area, and beyond that is a gated residential area enclosed by a brick wall.

Directly north of the proposed premises, on the other side of Cleveland Avenue, is another large vacant lot where a building is planned in which at least two of the protestants propose to locate their medical offices. To the east of the vacant lot is the

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<sup>2</sup>(...continued)

during the hearing, but are listed on the Proof of Service for the Notice of Hearing: Richard E. Gullans, Tejinder Sandhu, Amritpal S. Pannu, Kamaljut Singh, Guy A. Carr, Kuldip Singh Sandhu, Nirver S. Bal, Robert J. Chandler, Samrao Saturant, Fred A. Elias, and Jaspreet Sandhu.

<sup>3</sup>On July 12, 2004, appellant filed a petition for conditional license which would add conditions to the license prohibiting Sahib S. Aulakh from having any interest in or control of the licensed premises. These conditions are unrelated to any of the protest issues.

Kiddy Country Club Preschool, and to the west, a commercial office complex. To the north and west of these buildings and the vacant lot is a residential area. The northeast corner of the intersection of West Cleveland Avenue and North Schnoor Avenue, across the street from the preschool, is occupied by another shopping center, anchored by a Wal-Mart and a Pak 'n' Save.

Three of the businesses in the shopping mall already have alcoholic beverage licenses: the China Kitchen restaurant (type 41 - On-Sale Beer and Wine for Bona Fide Public Eating Place), Liquor Plus store (type 21 - Off-Sale General), and Food 4 Less grocery store (type 20 - Off-Sale Beer and Wine). The census tract in which the proposed premises is located (census tract 0007) is allowed eight off-sale licenses.<sup>4</sup> The Department investigator testified that Department records showed eight off-sale licenses already existing in the census tract.<sup>5</sup>

There are no residences within 100 feet of the proposed premises; the closest residence was estimated to be about 400 feet away, and the closest protestant lives over 580 feet away. There are no churches, elementary or secondary schools, or other "consideration points" within 600 feet. The preschool, 383 feet away on the other side of Cleveland Avenue, operates as a daycare center rather than a school. The director of the preschool, who was contacted by the investigator, did not anticipate any negative impact on children who attend the preschool and did not oppose the application.

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<sup>4</sup>Cleveland Avenue, which borders the north side of the shopping area, is also the northernmost boundary of census tract 0007. Licensed premises on the north side of Cleveland Avenue are in census tract 0006.01.

<sup>5</sup>One of these licenses was apparently surrendered to the Department because the business was not operating, but this license was included because it could be reactivated.

The investigator spoke with Sergeant Frazier, the Madera Police Department contact person for Alcoholic Beverage Control matters. Sergeant Frazier told her that the Madera Police Department did not consider the area around the premises to be a problem area or a high crime area. He did not feel that issuance of the license would cause an increase in crime or vandalism in the area or that it would have an adverse impact on children or youth who came to the shopping center.

In her several visits to the shopping center during the investigation, at different times of day, the investigator did not observe any significant loitering, litter, or vandalism.

The investigator concluded that, although there was statutory undue concentration in this area, public convenience or necessity existed to support granting the license. She testified that she had based her conclusion on the number of licenses, the lack of a high crime rate, zoning, the location in a commercial center, the issues raised by the protestants, the lack of nearby residences or consideration points, and the apparent lack of any nearby discount cigarette retailers.

Several of the protestants testified, expressing their concerns about the consequences of issuing the license:

- ▶ Gil Soto, an owner and officer of Cash Plus, also a tenant in the shopping area, testified that he was concerned that granting the license would cause an increase in loitering, vandalism, and crime. He based this on his negative experience when the number of licensed premises increased in a Fresno shopping center where another of his check cashing stores is located.
- ▶ Gamdur Brar, a pediatrician, testified that he was planning to build a medical office on the vacant lot on the north side of West Cleveland Avenue. His concern appeared to be primarily a general one about the harmful effects of smoking and drinking by teenagers. His counsel explained that the protestants felt

the Department does not deal adequately with the issue of public welfare. On cross-examination, Brar admitted that he did not yet own the vacant lot, but said the property was in escrow.

- ▶ Surinder Athwal owns the 99 Cents or Less store in the shopping center where the proposed premises are located. He said that people leave beer bottles and cans behind his store, and twice have started fires in the trash containers. Someone also vandalized his van once in 2004 when he left it parked behind his store. The day before the hearing he found graffiti on the back door of the store.
  
- ▶ Lori Pond, who lives in a gated community about a quarter of a mile west of the proposed premises, testified that she believed there were already plenty of places in the vicinity where one can buy alcohol and cigarettes. She felt that an additional retail outlet for alcoholic beverages "would just increase a different element, possibly, of people coming to this particular shopping center." The addition of one more liquor store would make a difference, she said, "Because it's common knowledge that as you start adding alcohol stores, tobacco stores, you do change the element of the consumer. That can't be argued. . . . As you watch towns change and degrade, it's generally because you have an addition of alcohol and cigarette stores. This happens to be a very nice part of Madera. . . . I'd like to see something – a better use of a building than [an] alcohol and tobacco store." [RT 108-111.]

Subsequent to the hearing, the Department issued its decision which sustained the protests and denied the application and petition.

Appellant appealed, contending that it discovered new evidence showing issuance of this license will not cause an undue concentration of licenses in the area and that substantial evidence does not exist to support the finding that undisputed testimony established the existence of a law enforcement problem. Appellant also filed a motion to augment the record with a recently received report from the Department. The motion and the new evidence contention will be discussed together.

## DISCUSSION

Business and Professions Code<sup>6</sup> section 23958 provides, in part, that the Department "shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or . . . would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." Undue concentration is deemed to exist when the area in which the applicant premises is located has a specified greater-than-average number of reported crimes or, with regard to an application for an off-sale retail license, the ratio of off-sale licenses to the census-tract population exceeds the ratio of off-sale licenses to the county's population. (Bus. & Prof. Code, § 23958.4, subds. (a)(1) & (a)(3).) Where undue concentration exists, the Department may nonetheless issue a license if the applicant shows that public convenience or necessity would be served by the issuance. (Bus. & Prof. Code, § 23958.4, subd. (b)(2).)

The Department investigator testified, and the administrative law judge (ALJ) found, that the census tract in which the proposed premises is located has eight existing off-sale licenses, the maximum number allowed under Business and Professions Code section 23958.4, subdivision (a)(3). (Finding of Fact (FF) 11.) Issuing a license to appellant, the ALJ found, would result in an undue concentration of licenses. (FF 12.) Although the Department had determined that public convenience or necessity existed to allow the license to be issued, the ALJ rejected that determination, finding that it did not logically follow from the factors on which the investigator said it was based. (FF 16.)

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<sup>6</sup>Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

Appellant contends the Department relied on a report that incorrectly stated there were eight existing off-sale licenses in census tract 0007, where the proposed premises are located. Newly discovered evidence, appellant says, shows that this census tract has only seven off-sale licenses, and since eight off-sale licenses are allowed, issuing the license to appellant will not result in an undue concentration of licenses.

Appellant asserts that, exercising reasonable diligence, it could not have produced this new census tract information at the hearing. Therefore, appellant argues, the Board should remand this matter to the Department for reconsideration in accordance with Business and Professions Code section 23085,<sup>7</sup> and the record should be augmented with the census tract report appellant recently received from the Department showing only seven existing licenses in the census tract.

At the hearing, the Department investigator read aloud the addresses of the eight off-sale licensed premises in census tract 0007 shown on a Departmental computer-generated list. One of those listed was an off-sale beer and wine license at 17017 Road 26 in Madera. [RT 66.] Appellant contends this license, for the Country Club Food Mart, was mistakenly included in the census tract 0007 list from which the investigator read. On August 10, 2005, appellant states in his brief, the Department's

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<sup>7</sup>Section 23085 provides, in relevant part, that "where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence." Section 23084, subdivision (e), states that one of the questions the Appeals Board is authorized to consider when reviewing a decision of the Department is "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before the department."

Web site (<<http://www.abc.ca.gov/>>) showed this premises to be in census tract 0005.06.

Appellant points out that the Department investigator alluded to possible errors in the Department's census tract listings because of recent census tract boundary changes made by the United States Census Bureau. When asked by appellant's counsel if she had anything with her that would indicate what particular licenses were included in census tract 0007, the investigator responded [RT 63-64]:

I believe there's a printout that shows census tract seven, in particular. We are in the process, though, of making corrections, since they changed our census tract guide – boundaries within the past year, as well. So our department's trying to catch up and remove – or put them into the proper census tract, since the boundaries have changed, and it's come to our attention within the past year that there has been some mistakes as to certain businesses that are placed in certain census tracts. They may have a new assignment number now.

Counsel then asked the investigator, "Well, do we know for sure what eight [off-sale licensed premises] are in this tract?" The investigator answered that she "would have to refer to the census tract printout." [RT 64.] After a short break in the proceedings, during which the investigator apparently retrieved the printout of census tract 0007 licenses to which she had previously referred, she read off the addresses of the licenses in the census tract listed there. [RT 66.]

Appellant's counsel then referred to the investigator's earlier testimony that the census tract boundaries were changed from time to time, and she responded [RT 68]:

Yes, and then we have to go back into our system and correct and place those licenses that may be within the wrong census tract. Like, for example, the Savemart that's on Howard Drive, I have a question, just because of the area, that that is possibly one of the ones that could be put in the wrong census tract.



Counsel then asked her, "So wouldn't it be fair to say that just relying on a census tract alone is basically an artificial way to determine how many licenses should be in a particular area?" The investigator responded, "It's the most accurate information that we have available to us or afforded to us right now." [RT 68.]

The protestants argue that the Board should not consider appellant's "new evidence" or remand this matter to the Department because appellant did not exercise reasonable diligence in producing the evidence of a mistaken license count. They contend lack of diligence is shown by appellant's failure to question the investigator about this at the hearing or to petition the Department for reconsideration immediately after the decision was issued. The Department also opposes augmenting the record because, it says, appellant has not shown why, with due diligence, the evidence could not have been discovered and produced at a continued hearing before the Department.

The Department does not deny that the correct number of off-sale licenses in the census tract is seven. As appellant points out in its brief, the Department is the sole entity responsible for maintaining and providing the records of the number of licenses within each census tract. In this case, the record contains no evidence indicating that appellant had any reason to know, before the hearing, that the Department's records might be wrong; therefore, it cannot be said that appellant's failure to produce this evidence at the hearing was due to a lack of reasonable diligence.

The more difficult question is whether appellant exercised reasonable diligence when the Department investigator testified that some licenses might be listed in the wrong census tracts because of boundary changes made by the Census Bureau. From examining the hearing transcript, however, we have concluded that appellant's failure to

pursue this issue during the investigator's testimony does not show a failure to exercise reasonable diligence.

At best, the investigator's testimony about the possible inaccuracies was ambiguous. Although she mentioned the possibility of errors, when specifically asked whether she "[knew] for sure what eight are in this tract," she responded that she would have to consult the printout, implying that when she read the license information from the printout, it was accurate.

Counsel, with reasonable diligence, asked again about the possibility of errors that the investigator had mentioned before. The investigator said that she had some doubts about one of the licenses on the list being in the right census tract, which might be considered a signal that appellant needed to pursue the issue further. However, in response to counsel's question about the artificiality of using census tracts to determine license density in an area, the investigator said that the census tract information was "the most accurate information that [the Department had] available . . . right now." Although the investigator's answer appears to be not directly responsive to the question, and the question is not clearly connected to the preceding questions, the fact remains that the investigator once again implied that the information she provided at the hearing was accurate.

It is not clear from appellant's motion to augment the record and its accompanying affidavit by appellant's attorney when appellant first discovered the inaccurate license count for this census tract. However, appellant states in his brief that he received a report from the Department on August 5, 2005, showing seven existing licenses in census tract 0007.

We believe that appellant, exercising reasonable diligence, could not have produced at the hearing the information that the investigator's report was inaccurate and that only seven off-sale licenses existed in the census tract. The circumstances did not warrant a request for a continuance, since the investigator's testimony, although ambiguous, could reasonably be seen as providing the correct information. There is no requirement that appellant petition the Department for reconsideration, and if appellant did not receive the information about the error within 30 days after the decision was issued by the Department, reconsideration would not have been available. (Gov. Code, § 11521.)

As for the motion to augment the record, the applicable statute (Bus. & Prof. Code, § 23085) provides that, "where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence." The statute clearly contemplates that the evidence which could not have been produced at the original hearing is to be examined by the Department on remand. The Department, as trier of fact, will make the determination about the admissibility of the evidence. Therefore, the motion to augment should be denied.

## II

Appellant contends it was error for the Department to find there was a law enforcement problem and the ALJ was incorrect when he stated that "there was undisputed testimony" of the existence of law enforcement problems.

This issue is addressed in Finding of Fact 6:

Section 23958 of the Business and Professions Code (all further statutory references are to that code) requires the Department to deny an application for a license if issuance of the license would tend to create a law enforcement problem. The applicant premises are located within the jurisdiction of the Madera Police Department, which was informed of the pending application and had no objection to the license being issued. However, there are currently three establishments selling alcoholic beverages in the shopping center in which the applicant premises are located, and although there was no evidence of "underage drinking or smoking, there was undisputed testimony that law enforcement problems in the form of littering, vandalism and consumption of alcoholic beverages in unlicensed public areas are now occurring within the shopping center. It is, therefore, reasonable to assume that issuance of the applied-for license would cause these law enforcement problems to increase.

"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].) Other courts have explained this concept further:

"[T]he focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872 [269 Cal.Rptr. 647].) Of course, "[t]rial court findings must be supported by substantial evidence *on the record taken as a whole*. Substantial evidence is not [literally] any evidence—it must be reasonable in nature, credible, and of solid value." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834, 865 P.2d 633], italics [and bracketed insertion] added.)

(*Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 305 [58 Cal.Rptr.2d 721].)

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 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, 94 [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. (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [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]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department reasonably determines, for "good cause," that the granting or the continuance of such license would be contrary to public welfare or morals. The Department's 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 [256 P.2d 1], and adding bracketed insertion.) "[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].)

Even approaching this decision prepared to resolve conflicts and accept reasonable inferences in favor of the Department's decision, we cannot say that this record supports Finding 6 with substantial evidence.

In *Arabo* (2002) AB-7367, this Board discussed what evidence supports a finding of a law enforcement problem:

The term "law enforcement problem" in §23958, while it could be read broadly, must be interpreted "in light of the constitutional requirement of 'good cause' for the denial of a license . . . ." (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board [(1981)] 122 Cal.App.3d [549] at 556 [[175 Cal.Rptr. 342]].) In the case just cited, the court reviewed what had been found to constitute "police problems" in prior cases. "In all of them, there was repeated or on-going criminal conduct of legitimate and substantial concern to law enforcement agencies, not a mere expectation that 'disturbances would sometimes occur.'"<sup>6</sup> (*Id.* at 556-557 (fn. 6).)

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<sup>6</sup>Examples given of "police problems" included "a long-standing, 'continuous police problem' . . . referring to 'the difficulty of controlling the idle, the dissolute and the criminal element of a city tending to congregate at a designated place'" (in Parente v. State Board of Equalization (1934) 1 Cal.App.2d 238 [36 P.2d 437]); "the added difficulty of enforcing liquor control laws in an area of 'undue concentration' of licensed establishments in which 75 arrests were made each week for public drunkenness and other offenses" (in Torres v. Dept. of Alcoholic Bev. Control (1961) 192 Cal.App.2d 541 [13 Cal.Rptr. 531]; intoxicated persons were arrested at premises "almost daily" (in Harris v. Alcoholic Bev. Control Appeals Board. (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74]).

In contrast, in the present case there is no finding and, indeed, no evidence, of crime problems such as those described in the case above. In Factual Finding 6, the

Department admits that the Madera Police Department had no objection to issuing the license and that there was no evidence of underage drinking or smoking. Nevertheless, it found that, because of three other licenses in the shopping center and "undisputed testimony that law enforcement problems in the form of littering, vandalism and consumption of alcoholic beverages in unlicensed public areas are now occurring within the shopping center," it was "reasonable to assume" that issuing this license would cause those existing "law enforcement problems" to increase.

Nothing more is said of law enforcement problems until Legal Conclusion 1, which states, in its entirety:

Issuance of the applied-for license is prohibited under Section 23958 by reason of the facts set forth in Factual Finding 6, above, which establish that issuance of the license would create a greater law enforcement problem than currently exists.

This Board is of the opinion that the Department abused its discretion in denying this license because it did not apply a proper standard in determining that issuance of this license would create or worsen a law enforcement problem. Even if the testimony by one (and only one) of the protestants about littering, vandalism, and consumption of alcoholic beverages were undisputed, these incidents in no way approach the magnitude of those which have been considered by the courts to constitute "good cause" for denying a license application. If these problems were a justifiable basis for denying an alcoholic beverage license, the state of California would certainly have no more than a handful of alcoholic beverage outlets of any kind.

ORDER

The decision of the Department is reversed and the matter is remanded for reconsideration in light of the evidence appellant has regarding the number of licenses in the census tract.<sup>8</sup>

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

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<sup>8</sup>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.