

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

AB-8416

File: 47-311822 Reg: 04058324

MEY CHEN, NGAY CHEN, and SUN CHEN dba Blue Dolphin Restaurant & Billiards
34130 Coast Highway, Dana Point, CA 92629,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: FEBRUARY 3, 2006

Mey Chen, Ngay Chen, and Sun Chen, doing business as Blue Dolphin Restaurant & Billiards (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which denied their petition for the removal or modification of a condition imposed upon their license.

Appearances on appeal include appellants Mey Chen, Ngay Chen, and Sun Chen, appearing through their counsel, Bob E. Thacker, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued in February, 1997. When the license issued, it included several conditions, one (condition 7) of which prohibited live entertainment, amplified music, or dancing on the premises at any

¹The decision of the Department, dated March 10, 2005, is set forth in the appendix.

time. The petition for conditional license filed by appellants recited, among other things, that 12 residences were located within 100 feet of the proposed premises or parking lot, and issuance of the license without conditions would interfere with the quiet enjoyment of the property of nearby residents and constitute grounds for the denial of the application under Department Rule 61.4.²

By letter dated June 13, 2004, appellants asked the Department to effectively remove condition 7. After investigation, the Department opposed the removal of the condition and an administrative hearing followed.

The administrative hearing was held on January 21, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined the circumstances which led to the imposition of the condition on the license had not changed, and denied the request that condition 7 be removed. Appellants thereafter filed a timely appeal in which they contend that the decision is not supported by substantial evidence, in that the City of Dana Point has issued a conditional use permit which would permit live entertainment conducted in compliance with the city's noise restrictions.

DISCUSSION

Appellants contend that the issuance of a conditional use permit by the City of Dana Point which permits live entertainment constitutes substantial evidence of the

² Department Rule 61.4 (Title 4, Cal.Code Regs., §61.4) provides that no retail license shall be approved where the proposed premises or its parking lot are located within 100 feet of a residence. The rule further provides an exception to that prohibition where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property of the residents. In certain cases, as here, the Department may issue a license containing conditions intended to protect the quiet enjoyment of residents within 100 feet of the premises

removal and prevention of activity which might result in residential disturbance. Thus, they argue, there is no longer any need or justification for the continued existence of the condition.

The Department is authorized under certain circumstances to place reasonable conditions upon a retail license in a number of situations. (Bus. & Prof. Code, §23800.)³ Section 23803 authorizes the Department, on its own motion or upon the petition of a licensee, to remove or modify any such condition if it is satisfied that the grounds which caused the imposition of the condition no longer exist.

The Department concluded (Conclusion of Law 6) that the appellants had failed to establish that the grounds that caused the imposition of condition 7 no longer exist. It found as a fact (Finding of Fact 7) that there are seven residences in three separate buildings located behind the rear wall of the premises parking lot just across a narrow alley.

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.⁴

Appellants rely on the decision of the Appeals Board in *7-Eleven, Inc./Conlan*

³ All statutory references are to the Business and Professions Code,

⁴The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

(2002) AB-7823, a case on which the Board concluded that the Department had abused its discretion in denying an application for a license which would have contained conditions intended to protect the quiet enjoyment of residences within 100 feet of the premises or its parking lot.

The decision in *7-Eleven, Inc./Conlan* does not support appellants' position. In that case, it was the failure of the Department even to consider whether the proposed conditions, some of which were also in a conditional use permit issued by the City of San Diego, would have permitted the issuance of a license under the exception contained in Rule 61.4 even though there were residences within 100 feet of the premises.

In the present case, the license may well not have issued but for the inclusion of condition 7. The Department in this case did exactly what this Board found it had not done in *7-Eleven, Inc./Conlan*, that is, it considered whether the imposition of conditions would afford protection to residents within 100 feet of the premises. Having done so, it agreed to issue the license.

The issue now is not whether the Dana Point conditional use permit would provide protection to residences within the scope of Rule 61.4. The issue is whether the grounds which gave rise to the condition in the license in question no longer exist. Clearly, they do.

The Department found that the disturbances to nearby residents "have been limited ever since [appellants] have been in compliance with the conditions. ... It appears as if following the conditions has, for the most part, achieved the intended result." (Conclusion of Law 7.)

We cannot say that the Department has abused its discretion in denying

appellants' application to remove condition 7. It is apparent from the very thorough analysis reflected in the proposed decision that the ALJ gave careful thought to the issues presented by appellants, and found them to lack merit.

ORDER

The decision of the Department is affirmed.⁵

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

⁵ 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.