

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

**AB-8689**

File: 20-403849 Reg: 06064316

ALMA ROSA MEDINA AHUMADA and JESUS AHUMADA, dba Establos Meat Market  
2633 Ventura Boulevard, Camarillo, CA 93010,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: February 7, 2008  
Los Angeles, CA

**ISSUED MAY 30, 2008**

Alma Rosa Medina Ahumada and Jesus Ahumada, doing business as Establos Meat Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which denied their petition for modification of conditions on their off-sale beer and wine license.

Appearances on appeal include appellants Alma Rosa Medina Ahumada and Jesus Ahumada, appearing through their counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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<sup>1</sup>The decision of the Department, dated April 5, 2007, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' license was issued, with 22 conditions, in May 2004. Two years later appellants filed a petition for modification of one condition and elimination of another, pursuant to Business and Professions Code<sup>2</sup> section 23803. The Department denied the petition and appellants requested a hearing, which was held on January 23, 2007.

At the administrative hearing, documentary evidence was received and testimony was presented regarding the Department's investigation. Co-licensee Jesus Ahumada (Ahumada) also testified about the operation of the licensed premises.

When appellants applied for their license in 2004, the proposed premises was located in an area of "undue concentration," because there were 10 off-sale licenses in that census tract, but only five were authorized under the statutory formula.<sup>3</sup> The proposed premises was also within 600 feet of a church, Saint Mary Magdalena. Appellants' petition for a conditional license, in 2004, recited the undue concentration of licenses and the proximity of the church as grounds for the imposition of the conditions. Appellants agreed to 22 conditions, which included restricting the sale of alcoholic beverages to the hours of 11:00 a.m. to 9:00 p.m. daily (Condition 1) and prohibiting sales of beer in containers larger than 22 ounces or fewer than six per sale (Condition 2). Appellants' petition for modification, in 2006, asked that Condition 1 be modified to allow sales of alcoholic beverages from 7:00 a.m. to 9:00 p.m. daily and that Condition 2 be eliminated.

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<sup>2</sup>Unless otherwise indicated, all statutory references in this opinion are to the Business and Professions Code.

<sup>3</sup>Section 23958.4, subdivision (a)(3), provides that an undue concentration of licenses exists when the proposed premises is located in an area in which "the ratio of off-sale retail licenses to population in the census tract . . . exceeds the ratio of off-sale retail licenses to population in the county . . . ."

The Department investigator testified that at the time of appellants' petition to modify the conditions, the off-sale licenses in census tract had been reduced to eight,<sup>4</sup> still an undue concentration, and the church was still located within 600 feet of the premises. Therefore, the investigator recommended, and the Department issued, a denial of the petition to modify.

Ahumada testified that he lives near the licensed premises and attends Saint Mary Magdalena church with his family. The church provided him with a written statement that it was not opposed to the condition modifications being proposed (Exhibit B). His market is the only one in the area catering to the Hispanic community, and he wants the modifications because his customers have requested the ability to buy alcoholic beverages earlier in the day when they do the rest of their shopping and in larger containers to serve their families at a lower cost.

Subsequent to the hearing, the Department issued its decision which denied the petition to modify conditions. Appellants filed an appeal contending the Department erred in determining that the grounds causing imposition of the conditions still existed and violated their right to due process.

## DISCUSSION

### I

Section 23800 provides that the Department may impose reasonable conditions on alcoholic beverage licenses in order to remove what would be grounds for denying the license. Section 23803 provides that license conditions shall be removed or modified by the Department "if [the Department] is satisfied that the grounds which caused the imposition of the conditions no longer exist."

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<sup>4</sup>It is not clear whether this included appellants' premises or not.

Appellants contend that a 1992 Appeals Board decision, *Gebre-Mariam* (1992) AB-6117, prohibits the Department from being "super technical" in its application of the requirement that the grounds causing imposition of the conditions no longer exist. In *Gebre-Mariam*, the Board remanded the Department's denial of a petition for modification of a condition that prohibited alcoholic beverage sales after 10:00 p.m.

The Board discussed *Gebre-Mariam* in a later appeal, *Huh* (1999) AB-7155:

In [*Gebre-Mariam*], the area around the premises at the time the condition was placed on the license was dark and graffiti-covered, a problem area with drinking and crime during the night hours. The Department denied the modification because there had been no change in the grounds which caused the condition to be imposed - the presence of eighteen residential units within 100 feet.

The Board remanded the case to the Department for reconsideration, influenced by the efforts of the licensee in persistently painting over graffiti, installing lighting near the alley, hiring a part-time security guard and working with his neighbors in eliminating problems. Thus, although there was no change in the fact that residential units were still located within 100 feet of the premise, there appeared to have been an elimination of gang activity and other disturbances in the rear alley which separated the residential units from the licensed premises. The Board was also influenced by the fact that other nearby restaurants do not close until 1:00 a.m., and have operated without disturbances.

The Board then rejected *Gebre-Mariam* as controlling the outcome in *Huh*, saying:

The *Moges Gebre-Mariam* case is one with its own peculiar facts, and offers little in the way of precedential value for this case. Appellant cites the case for the proposition that even without geographic or residential changes, the operational history of the licensee and the current attitude of the community are sufficient to constitute changed circumstances. We agree with appellant to the extent those factors may be considered, but not to the extent they control the Department's discretion.

Similarly, *Gebre-Mariam* does not control the present case.

Appellants also argue it is not enough for the Department to say that conditions have not changed simply because there still exists an undue concentration of licenses

and the church is still within 600 feet of the premises. The Department ignores, they assert, the 20-percent decline in the number of off-sale licenses in the census tract, from ten to eight, and the statement from the church that it does not oppose the condition modifications appellants seek. They conclude that these factors clearly show the circumstances have changed and the modifications should have been granted.

Appellants are correct; the circumstances have changed. However, that is not the standard; the standard is whether the *grounds that caused the conditions to be imposed still exist*. It cannot be denied that the circumstances causing the conditions to be imposed still exist: There is still an undue concentration of licenses (at least eight exist where only five are allowed by the statutory formula) and the church of Saint Mary Magdalena is still within 600 feet of the licensed premises.

Appellants make much of the fact that the mere proximity of a church is not grounds for denying a license or, by extension, imposing conditions on a license. In this they are certainly correct. (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 880 [13 Cal.Rptr. 513, 362 P.2d 337].) However, the argument about the church is immaterial. Whatever the result regarding the proximity of the church, the issue of undue concentration remains.

Appellants try to circumvent the existence of undue concentration by asserting that their licensed premises satisfies the public convenience or necessity exception<sup>5</sup>

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<sup>5</sup> Business and Professions Code section 23958 provides 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." The Department may nevertheless issue an off-sale license "if the local governing body . . . determines . . . that public convenience or necessity would be served by the issuance." (Bus. & Prof. Code, § 23958.4, subd. (b)(2).)

because its operation is "tailored to an underserved minority community." (App. Br. at 14.) We cannot disagree with the assertion that public convenience or necessity has been established: The city of Camarillo made a finding of public convenience or necessity in 2004 when appellants first applied for their license. However, that finding was dependent on appellants' agreement to all 22 conditions imposed on the license. Public convenience or necessity allowed appellants to receive their license, as conditioned, and cannot now justify modification of those conditions.

Appellants also emphasize the reduction in off-sale licenses from ten to eight, but they have not explained why that reduction should justify modification of the conditions. They fault the Department for denying modification simply because there is still an undue concentration. However, appellants' argument – that the modifications should be allowed simply because there has been a reduction in the number of licenses that constitute the undue concentration – is no more convincing than the Department's.

The only real issue here is whether the continued existence of undue concentration, albeit less than before, is sufficient for denying the condition modifications. Put another way, was it an abuse of discretion for the Department to deny the modifications even though there were fewer licensed premises making up the undue concentration than there were when the license was issued?

This Board believes the answer is clearly no; there was no abuse of discretion by the Department. Even though appellants try to characterize the change in the number of licensed premises as meeting the standard of section 23803, the fact remains that the area still has an undue concentration of licenses. If appellants were applying for a license now, instead of a modification of conditions, the existing undue concentration would be the basis for denial of the license or imposition of conditions on the license.

Under the circumstances, it was well within the discretion of the Department to deny the petition for modification of conditions.

## II

Appellants contend the administrative hearing was "terminally invalid" as violating their right to due process because they were not served with a "precise Statement of Issues . . . so that appellants would have a notice and a meaningful opportunity to be heard as to the Department's denial of their requested modifications." (App. Br. at 17.) They assert they had no notice that the specific issues they needed to address were undue concentration and proximity to a church, and, therefore, any evidence regarding those issues should have been excluded "and the modifications thus granted as a matter of law." (*Ibid.*)

The document titled "Statement of Issues" stated merely that the issue to be determined was whether granting the petition would be contrary to public welfare and morals. This may well be insufficient notice. However, the Department's Notice of Denial of Petition clearly stated that the denial was based on the continued existence of the grounds which caused the imposition of the conditions in the first place. Those grounds were, as stated in appellants' original Petition for Conditional License, undue concentration and proximity to a church.

This issue was discussed at length during the hearing [RT 8-17], resulting in a great deal of confusion. The ALJ questioned the sufficiency of the notice and left it up to appellants' attorney (Kaplan) to decide whether he wanted a continuance due to insufficient notice. After consulting with his client, Kaplan stated they would not ask for a continuance, but that he reserved his objection to the inadequacy of notice on due process grounds. The ALJ and Kaplan continued:

- THE COURT: Well, I am granting – I would grant you the continuance if you ask for it. Thereby curing any issues of properly – to be noticed on those positions. So I am not sure what you intend to do by reserving that right when I am offering you the opportunity to have it corrected and in due course.
- MR. KAPLAN: I'm just not waiving the objection. And I am objecting on the grounds that it is that it not due process precise. [*Sic.*] But I am not requesting a continuance.
- THE COURT: So, what option are you asking for?
- MR. KAPLAN: Just to have the record reflect that I reserve the objection and I am not waiving.
- THE COURT: The record will reflect what you said. But the record will further reflect that I would grant you the opportunity to have this corrected in due course, if you so request. And since you are not requesting. . . .

[RT 18-19.]

We, like the ALJ, are a little confused as to what Kaplan was requesting, since by continuing with the hearing, he waived any objection he might have to lack of notice, regardless of what he "reserved." Appellants waived the right to raise this issue on appeal.

#### ORDER

The decision of the Department is affirmed.<sup>6</sup>

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

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<sup>6</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.