

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

AB-8932

File: 42-372148 Reg: 08068170

DUY NGOC DANG and MACH NGOC DANG, dba Monroe Club
16391-93 Beach Boulevard, Huntington Beach, CA 92647,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 4, 2010
Los Angeles

ISSUED MAY 12, 2010

Duy Ngoc Dang and Mach Ngoc Dang, doing business as Monroe Club
(appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹
which denied their petition for modification of a condition on their license to permit sales
of alcoholic beverages until 2:00 a.m. seven days a week

Appearances on appeal include appellants Duy Ngoc Dang and Mach Ngoc
Dang, appearing through their counsel, Thomas Avdeef, and the Department of
Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on
October 25, 2001. The license contained a total of 26 conditions, one of which limited
sales, service and consumption of alcoholic beverages to the hours of 10:00 a.m. to
12:00 midnight, Sunday through Saturday. On May 7, 2007, appellants requested that

¹The decision of the Department, dated August 18, 2008, is set forth in the
appendix.

the condition be modified to permit sales until 2:00 a.m. seven days a week. The Department denied the request, and appellants petitioned for a hearing.

An administrative hearing was held on June 18, 2008, at which time documentary evidence was received and testimony concerning the proposed modification was presented.

Subsequent to the hearing, the Department issued its decision denying the petition, stating that petitioners failed to establish that the grounds which caused the imposition of the conditions on their license no longer exist, and concluding with a statement that modifying the condition would be contrary to public welfare or morals.

Appellants filed a timely notice of appeal in which they raise the following issues:

- (1) The Department failed to establish that modification of Condition 1 would be contrary to welfare and morals;
- (2) there is no evidence that modification of Condition 1 would tend to create a law enforcement problem;
- (3) Business and Professions Code section 61.4 does not prohibit the issuance of a retail license to sell alcoholic beverages or modification of the existing license;
- (4) there is no evidence that the grounds which caused the imposition of Condition 1 continue to exist;
- (5) the evidence does not show the existence of a police problem;
- (6) the administrative law judge (ALJ) erred in placing the burden on appellants to show that the grounds which gave rise to the imposition of Condition 1 no longer exist.

DISCUSSION

We have concluded that resolution of appellants' issues 3, 4, and 6, *supra*, controls the result in this case.

Business and Professions Code section 23800, subdivision (a), provides that the Department may place reasonable conditions upon a retail license under specified conditions, one of which is "if grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions." The license involved in this appeal was issued with a total of 26 conditions imposed upon it. The petition for conditional license (Exhibit 3) set forth a number of recitals setting forth the reasons for the conditions, which we summarize: the proposed premises is located within the immediate vicinity of a residential area; the premises has had significant law enforcement problems involving violations of Business and Professions Code section 25657, subdivisions (a) and (b),² and Penal Code section 303a; an objection from the local police agency based on police problems occurring within the premises; and concern on the part of the Department about the operation of the premises based upon past law enforcement problems.

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

² Unless otherwise stated, all statutory references are to the Business and Professions Code.

decision is supported by the findings.

"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]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) 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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *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].)

Applying these standards, we are satisfied there is substantial evidence to support the ALJ's determination that reasons that supported the imposition of the license conditions, including Condition 1, continued to exist.

The petition stated, as one of the reasons for the imposition of conditions, that “the premises is located within the immediate vicinity of a residential area.” The premises remains “within the immediate vicinity of a residential area.” Department investigator Garcia testified that, by her measurement, the distance between the premises and the apartment complex was 46 feet. Co-licensee Duy Dang testified, in response to his own counsel’s question, that the distance from the edge of the Monroe Club building to the residence located behind it was “About 50 or 55” feet [RT 97].

Although Rule 61.4 is not directly involved in this case, its use of 100 feet as the proximity which shifts to the applicant the burden of proving that issuance of a license will not interfere with residents’ quiet enjoyment of their residences, certainly supports a range of 46 to 55 feet as being within the immediate vicinity of a residence. And since this was a matter of concern at the time the license issued, there is no basis for finding that it is no longer a matter of concern.

The fact that there have been no complaints from residents since the license issued is as much proof that the conditions are doing what they intended to do as it is that there is no need for such a condition. Appellants have simply not met their burden of showing that the reasons for the condition no longer exist.

Appellants incorrectly argue the burden of proof to show that the grounds which gave rise to the imposition of conditions still exist should properly have been placed on the Department. Aside from the fact that substantial evidence establishes that the circumstances remain the same with regard to proximity of premises and residences, rendering the burden of proof issue moot, section 23803 provides that the Department must be satisfied that the grounds which caused the imposition of the condition no longer exist before it is obligated to remove or modify it. It is only logical that appellants

bear the burden of proving what they contend.

We are inclined to agree with appellants that the evidence of continuing law enforcement problems is weak. However, we do not think it incumbent on the Department to show that every ground for the imposition of conditions is still extant. Given the unusually large number of license conditions deemed necessary for the license to issue, based on the site's history and surrounding circumstances, it is apparent that protection of the quiet enjoyment of nearby residents was a matter of substantial concern. Proximity of licensed premises to residences is always important, and in this case, controlling.

ORDER

The decision of the Department is affirmed.³

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

³ 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.