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

AB-9335
File: 20-489275 Reg: 11075042

ADAM and SHERRY NICK, Appellants/Protestants

v.

7-ELEVEN, INC., dba 7-Eleven
20562 Regency Lane, Suite A, Lake Forest, CA 92630,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 7, 2013
Los Angeles

ISSUED DECEMBER 26, 2013

Adam and Sherry Nick (appellants/protestants, hereinafter appellants) appeal from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of 7-Eleven, Inc., doing business as 7-Eleven (respondent/applicant, hereinafter applicant), for an off-sale beer and wine license.

Appearances on appeal include appellants Adam and Sherry Nick, appearing through their counsel, Joshua Kaplan and Stephen Berger; respondent/applicant 7-Eleven, Inc., appearing through its counsel, Ralph Barat Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated January 9, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On April 26, 2010, applicants petitioned for issuance of an off-sale beer and wine license in the City of Lake Forest. Protests were filed by appellants and others, and an administrative hearing was held on November 8, 2012. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Subsequent to the hearing, the Department issued its decision which denied appellants' protests and allowed the license to issue.

Appellants thereafter filed a timely appeal, and make the following contentions: (1) The Department erred in ceding the PCN[2] decision to Lake Forest rather than making its own decision; (2) the Lake Forest PCN was untimely and unsupported by substantial evidence; (3) the Department erred in excluding evidence that 7-Eleven was not a responsible licensee; and (4) the application process was tainted by failure to disclose applicant's co-owner.

DISCUSSION

I and II

Appellants argue that the Department exceeded its authority by accepting the determination of the City of Lake Forest that the statutory requirement of public convenience or necessity (PCN) for the issuance of an additional license in an area of undue concentration was met, rather than conducting its own investigation, and on the issue whether the PCN determination was timely.

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[2]"PCN" is an acronym commonly used to refer to the phrase "public convenience or necessity" used in Business and Professions Code section 23958.4, subdivisions (b)(1) and (2), where undue concentration may be an issue.

The ALJ found (Finding of Fact IV-C):

> In reaching its determination that the issuance of the applied-for license would serve public convenience or necessity, the City of Lake Forrest (*sic*) consulted its Police Services and took many factors into consideration including the following: the character of the premises, the aesthetics and ambience of the proposed business, the attractiveness of the business, the manner in which the business is to be conducted or unique features, the types of guests, the mode of operations, the ability to serve an underserved population and the convenience of purchasing alcohol in conjunction with specialty food sales or services. Furthermore, the City of Lake Forrest (*sic*) made its determination based on the following factors: proper zoning, adequate parking per the City's Zoning Ordinance requirements, the fact that the premises will provide an array of items for sale in addition to alcohol including convenience grocery items, snack foods, beverages, magazines, cigarettes and coffee, the fact that the premises will feature a coffee bar, fresh sandwiches and salads, fresh fruit, baked goods, sushi and hot foods including freshly baked pizzas. The City also took into account the fact that the premises will provide a convenient location for the public to shop for necessities while also purchasing alcohol and the fact that the premises will sell its exclusive 7-Eleven private label line which can only be purchased at a 7-Eleven store.

The City of Lake Forest's determination that the test of convenience or necessity had been met was not casually adopted; it survived objections at every level, beginning with its issuance by the City's Director of Development Services, followed by an appeal to the City Planning Commission, which conducted a public hearing on the issue, then followed by an appeal to the City Council of its planning commission's resolution affirming the determination. The Lake Forest City Council ultimately decided by a 4-1 vote to deny the appeal and issue the PCN determination. (See Petitioner's Exhibit 9, a copy of Lake Forest City Council Resolution No. 2011-09.)[3]

The Department argues that it was entitled to rely on the City of Lake Forest's PCN determination as part of its investigation preceding its issuance of the license, and

[3]Protestants Adam and Sherry Nick (referred to in Resolution No. 2011-09 as "Adam and Sherry Nick & Associates, Inc. dba ARCO am pm") are included among those pursuing the appeal.

we agree. We read Business and Professions Code section 23958.4, subdivision (b)(2),[4] as providing it with sufficient authority to rely on such a determination as part of its own determination that issuance of the license would be consistent with public welfare and morals. We do not read the statute as simply creating a meaningless exercise on the part of a local governing body which, after significant deliberation, decides that it would be in its interest, from a standpoint of convenience, that another license be issued. Nor do we read the statute as compelling the Department either to accede to such a determination or give it no weight whatsoever. We believe the Department's broad discretion in its issuance or denial of an off-sale license permits it to consider the PCN and give it the weight it thinks it deserves. As the court in *Sepatis v. Alcoholic Beverage Control Appeals Bd.*[5] said, "[w]here the decision is the subject of

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[4]Section 23958.4, and subdivisions (b) and (b)(2), thereof, provide

> (b) Notwithstanding Section 23958, the department may issue a license as follows:
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> (2) With respect to [issuance of] any other license, if the local governing body of the area in which the applicant premises are located, or its designated subordinate officer or body determines within 90 days of notification of a completed application that public convenience or necessity would be served by the issuance. The 90-day period shall commence upon receipt by the local governing body of (A) notification by the department of an application for licensure, or (B) a completed application according to local requirements, if any, whichever is later.
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> If the local governing body, or its designated subordinate officer or body, does not make a determination within the 90-day period, then the department may issue a license if the applicant shows the department that public convenience or necessity would be served by the issuance. In making its determination, the department shall not attribute any weight to the failure of the local governing body, or its designated subordinate officer or body, to make a determination regarding public convenience or necessity within the 90-day period.

[5]110 Cal.App.3d 93, 102 [167 Cal.App.2d 729.]

choice within reason, the department has the discretion of making the selection which it deems proper." (*Ibid*.)

Appellants also contend in this appeal that the determination is untimely. They assert, citing hearing transcript pages 135-136, that the parties agreed, by way of stipulation, that the Department requested Lake Forest for a "PCN advisory" on June 29, 2010, and none was forthcoming until October 4, 2010 (App.Br. at pp. 14, 18; App.Cl.Br. at pp. 5-6.), 97 days following the Department's request.

Applicant 7-Eleven contends that, since appellants did not raise a timeliness issue at the administrative hearing, they are barred from raising it now. But appellants dispute the assertion that they failed to raise the issue at the Department hearing, pointing to portions of the hearing transcript (RT 58; 136; 125-127; and Exhibit 9) where they contend the timeliness issue was "joined and presented below." (App.Cl.Br. at p. 11.) We have looked at those pages, and do not agree with appellant that casual references to various dates during colloquies with the ALJ and counsel rise to the level of "join[ing] and present[ing]" an issue for the ALJ to consider. We think this especially true when there is not even a suggestion in appellants' counsel's closing argument to the ALJ that timeliness is an issue. It is understandable, therefore, why the ALJ did not address the timeliness issue in his proposed decision.

We find the determination of the City of Lake Forest to be timely. But for delays generated by appellants' challenges to the determination by the City's designated subordinate officer, challenges at every level of city government (and, according to applicant's brief, even appeals at the superior and appellate court level), the determination could have issued much earlier. Not having raised the issue in timely

fashion below, appellants are barred from raising it for the first time on appeal.[6] In any event, the statute is silent on the consequences of an untimely determination - it refers only to a situation where no determination was made at all, and then it extends that option to the Department. In this case, it could be said the determination was made at least three times, at three separate and distinct levels of city government alone. The cases say that where, as here, there is no specified sanction where a filing is required within a certain time period, the time requirement shall be considered directory.[7] Although appellants argue that the 90-day provision is jurisdictional, they offer no reasoning or authority for that contention.

The issues involving timeliness and the extent to which the Department could properly rely on the City of Lake Forest's determination of public convenience or necessity were appellants' principal arguments, and we find those arguments lack merit.

Appellants' contention that the Department decision is not supported by substantial evidence, discussed most extensively at pages 19-21 of their opening brief, is based primarily on an argument that 7-Eleven brings nothing new or unique to the location in question, in that its convenience store operation is not significantly different from appellants' convenience market. We accept as true the claims that each store sells thousands of products common to each store, except, perhaps for brand names, but do not believe that fact alone translates to an absence of convenience with a new

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[6]*Premier Medical Mgmt. Systems, Inc. v. Cal. Ins. Guarantee Ass'n* (2008) 163 Cal.App.4th 550, 564 [77 Cal.Rptr.3d 695]; *Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131 [19 Cal.Rptr.3d 381]; See also *Bullis v. Charter School v. Los Altos School Dist*. (2011) 200 Cal.App.4th 1022, 1037 [134 Cal.Rptr.3d 133].

[7]See *Smith v. Los Angeles* (1910) 158 Cal. 702, 710 [112 P. 307]; *Buswell v. Board of Supervisors* (1897) 116 Cal.351 [48 P. 226].

entrant into the market. Both the decision and the briefs are silent on one significant factor, and that is that the close presence of two convenience store competitors with similar product lines offers to consumers an enlarged potential of price and service competition where, heretofore, there may have been little or none.

Appellants rely heavily on the decision in *Sepatis v. Alcoholic Beverage Control Appeals Bd.* (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729] for the proposition that, by failing to show that its operation would bring something new or unique to the area, 7-Eleven did not meet the requirements of that case and did not show public convenience or necessity.

Sepatis involved an application by William Sepatis for an on-sale retail liquor license in an area where there were already existed "four too many" licenses according to the Department's statistical assessment. The applicant offered evidence that his proposed bar would be different from existing bars; it was to be a "fern bar ... marked by an ambience of ferns and other plants, the interior of which is visible from the outside." Sepatis planned to operate the bar as a Victorian type of pub.

The Department granted the application, finding that the proposed premises would appeal to all segments of the community, including many people reluctant to enter other bars in the vicinity, and this would serve public convenience or necessity. The Appeals Board reversed. Its holding, as described by the court of appeal, was that the term "public convenience or necessity" relates simply to the availability of alcoholic beverages for purchase by the general public of a community, and that the Department may not concern itself with the physical appearance of the structure, or that some group of persons might not prefer to be in the company of some other group of persons. The court, in turn, reversed the Appeals Board decision.

The court acknowledged that the Appeals Board's view that the statutory provisions and relevant administrative regulations focused upon the number and location of premises where alcoholic beverages may be obtained, rather than the character of a particular premises or expressions of public preferences among premises, but expressed its concern that, without adopting standards susceptible to meaningful review, the denial of a *license* for failure of the applicant to show public convenience or necessity, might well give rise to meritorious claims of arbitrary administrative action.

Nonetheless, the court found that the Department's action was not without support in law and reason. Agreeing that the phrase "undue concentration" includes all relevant factors pertaining to the number and location of premises, it said that the phrase "public convenience or necessity" must mean something more:

> [I]t is certainly not unreasonable to suggest that public convenience may be served by the character of [particular premises. If the mere availability of alcoholic beverages were all that is involved in a bar, the proliferation and apparent success of that institution throughout the ages would be difficult to explain. Persons desiring only to consume alcoholic beverages may presumably satisfy their desire less expensively in other ways. It is a matter of common knowledge and experience, known even to judges, that many if not most people patronize bars for reasons which presumably include but also transcend their thirst for intoxicating liquids.

Sepatis, supra, 110 Cal.App.3d at p. 101.

Concluding that the Department made a choice within reason,[8] the court found

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[8]Quoting from *Koss v. Dept. of Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219], the court wrote:

> [I]n determining whether facts established by substantial evidence constitute good cause for concluding that issuance of a license will not be contrary to public welfare and morals, the department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject .... Where

that the Department acted within its discretion.

Lastly, we do not agree with appellants that the *Sepatis* decision *requires* a showing of something unique or new, or some other limiting factor. *Sepatis* says that the Department may look at factors in addition to the raw number of premises in an area where is undue concentration when determining whether a showing of public convenience has been met. Where the determination of the Department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises. That is the teaching of the *Sepatis* decision.

III

Appellants contend that the Department erred in preventing them from offering evidence to show that 7-Eleven is not a responsible licensee and should not be trusted with a license. Although no formal offer of proof was made, appellant Adam Nick testified that he went to the Department to obtain data on 7-Eleven license history, because he believed 7-Eleven was not a responsible retailer of alcohol. Appellants' brief asserts that a "voluminous record of proof " would be offered with respect to their claim 7-Eleven was "unfit to be trusted with a license. (App.Br. at pp. 21-22).

The ALJ agreed that evidence with respect to the operation of the location in

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> the decision is the subject of choice within reason, the department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals board or the court may not interfere therewith. ... Where the determination by the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises.

(*Sepatis, supra*, 110 Cal.App.3d at p. 102.)

Lake Forest would be relevant, but to explore the history of hundreds of 7-Eleven stores throughout the State of California, many of which he understands are operated by franchisees, would not be relevant. [RT 155.] He also ruled the issue was not one which was included as a protest issue:

> THE COURT: And I'm just looking back at my notes, here, that the issue of whether or not this applicant was a responsible licensee was brought up by Mr. Berger.
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> We discussed it. I indicated that it's not included in the protest, and that we would not be listing that as one of the issues.
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> And it's not one of the issues. As far as - - I allowed Mr. Nick to give his opinion regarding whether or not he feels that the applicant would be a responsible licensee.
>
> But we've heard his opinion. But I think we need to move on.

[RT 159.]

Evidence Code section 352 allows a court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

We think this experienced ALJ knew as well as anyone what the consequences of delay and confusion could be if appellants were permitted to explore 7-Eleven's ABC history. The hearing would be overwhelmed with what could amount to a mini-retrial of numerous disciplinary proceedings where appellants would point to a sale to minor violation and 7-Eleven would show that a low-level employee of a franchisee committed the violation and 7-Eleven itself took responsible disciplinary action or provided instructive advice to prevent +a future violation. His ruling is in accord with the intent of section 352 of the Evidence Code, and well within his discretion.

We also believe the ALJ ruled within his discretion in excluding such evidence as irrelevant in light of the fact that the issue of 7-Eleven's fitness to hold a license was not a protest issue.

IV

Appellants claim that 7-Eleven failed to disclose a co-owner of the business, a person named Bahar, identified as such in the testimony of Chris Hannon, a business consultant employed by 7-Eleven. They allege this "hidden ownership" violates Business and Professions Code section 24200, subdivision (c), which states, as a ground for the suspension or revocation of a license, "[t]he misrepresentation of a material fact by an applicant in obtaining a license."

Both applicant 7-Eleven and the Department argue that appellants, by failing to raise issue of Bahar's ownership, are precluded from raising it in this appeal. In response, appellants assert that the issue was sufficiently raised by the fact it was explored in questioning of a witness during the hearing.

We are inclined to agree with 7-Eleven and the Department that appellants' failure to raise this issue during their closing argument at the Department hearing precludes them from raising it now. There is nothing in what appellants' counsel said in his closing argument that even remotely bears on an ownership issue. [See RT 180-186.]

That said, this Board thinks the issue of ownership of sufficient importance that it should be examined in spite of not having been raised before the Department. Ms. Hannon, a 7-Eleven field consultant for its franchisees, seemed to be firm in her belief Mr. Bahar had an ownership interest in the business. (See RT 124-127.)

The arrangement described by Ms. Hannon differs from what we understand has

been 7-Eleven's operational style in the past. She described M. Bahar as a franchisee, but that he was not on the license (as a co-licensee).

As things stand, there is in the record unrefuted, unexplained, sworn testimony indicating that Mr. Bahar has an hitherto undisclosed ownership interest in the Lake Forest 7-Eleven store. The Department and 7-Eleven may have a satisfactory explanation of why that is not a problem, but, by taking the position they did, neither has informed the Board what that explanation might be. This is something this Board should know. For that reason, and although we are affirming the Department decision on all other issues, we are remanding this matter to the Department to take appropriate steps to determine what, if any, ownership interest exists and what bearing, if any, that has on the propriety of the Department's issuance of a license.

ORDER

The decision of the Department is affirmed as to Parts I, II, and III, *supra*, and this matter is remanded to the Department for such further proceedings it may deem appropriate in light of our comments in Part IV hereof.[9]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[9]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.