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

AB-9418
File: 21-503229 Reg: 13078653

BOOTA S. SAMRA,
dba Ernie's Liquor
922 Soquel Avenue, Santa Cruz, CA 95062,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 2, 2014
Sacramento, CA

ISSUED OCTOBER 16, 2014

Boota S. Samra, doing business as Ernie's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] denying his petition for removal or modification of conditions pursuant to Business and Professions Code section 23803.

Appearances on appeal include appellant Boota S. Samra, appearing through his counsel, Sally A. Williams, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated June 12, 2014, made pursuant to Business and Professions Code section 11517, subdivision (c), is set forth in the appendix, together with the proposed decision of the administrative law judge (ALJ). Section 11517, subdivision (c)(2)(E) permits the Department to reject the proposed decision, as it did here, and decide the case upon the record, including the transcript of the hearing.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 4, 2011. Appellant acquired the license by means of a person-to-person transfer. Previously, the premises were operated at the present location under a license held by Balbir Dhillon, which issued in 2008. Before that, Dhillon operated the business at a location across the street, under a license issued in 1996.

On June 3, 2010, Dhillon executed a stipulation and waiver agreement with the Department resolving a third sale-to-minor violation at the premises. The agreement imposed a penalty of revocation, with revocation stayed for 180 days to permit transfer of the license to a party acceptable to the Department and unrelated to Dhillon, along with a concurrent 30-day suspension. The validity of Dhillon's stipulation and waiver is not directly at issue in this case.

The dates surrounding appellant's application for a person-to-person transfer of the license, however, are murky. At some point, appellant purchased the premises from Dhillon. Appellant then operated the premises under a temporary license for "three or four months." The record provides no specific dates for either the purchase or the temporary license.

On February 1, 2010, appellant signed a Petition for Conditional License as part of his application for license transfer. (See Findings of Fact I; Exhibit 2, Petition for Conditional License.) Facially, the Petition for Conditional License appears to have been executed four months before Dhillon agreed to the stipulation and waiver in June of 2010. The record, however, includes a letter from Department Investigator Ferguson to appellant notifying him that conditions would be placed on his license at the request of the Santa Cruz Police Department. (See Exhibit E.) The letter is dated December

27, 2010 — eleven months *after* the Petition for Conditional License was apparently signed. (See *ibid.*; Exhibit 2.) Moreover, Dhillon sent a letter to the Department objecting to conditions imposed on appellant's license during the transfer, as they put the sale at risk. (Exhibit D.) That letter is dated January 6, 2011 — ten days after the Department's letter to appellant.

Regardless of the dates, the Petition for Conditional License signed by appellant included the following language and conditions:

> WHEREAS, petitioner has filed an application for the issuance of the above-referred-to license(s) for the above-mentioned premises; and,
>
> WHEREAS, pursuant to Section 23958 of the Business and Professions Code, the Department may deny an application for a license where issuance would result in or add to an undue concentration of licenses; and,
>
> WHEREAS, the proposed premises are located in Census Tract 1008, where there presently exists an undue concentration of license [*sic*] as defined by Section 23958.7 of the Business and Professions Code; and,
>
> WHEREAS, the petitioner stipulates that by reason of the aforementioned over concentration of licenses, grounds exist for denial of the applied-for license; and,
>
> WHEREAS, the proposed premises and/or parking lot, operated in conjunction therewith are located within 100 feet of residences; and,
>
> WHEREAS, issuance of the applied-for license without the below-described conditions would interfere with the quiet enjoyment of the property of nearby residents and constitute grounds for the denial of the application under the provisions of Rule 61.4, Chapter 1, Title 4 of the California Code of Regulations; and,
>
> WHEREAS, the Santa Cruz Police Department has requested the following conditions be placed on the license to address specific problems which it has successfully documented to the Department, pursuant to Section 23800 (e) & (f) of the Business and Professions Code; and,
>
> WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals;

NOW, THEREFORE, the undersigned petitioner does hereby petition for a conditional license as follows, to-wit:

1. The petitioner shall be responsible for maintaining free of litter the area adjacent to the premises over which he has control.

2. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee.

3. Any graffiti painted or marked upon the premises or any adjacent area under the control of the licensee shall be removed or painted over within 72 hours of being applied.

4. Petitioner shall regularly police the area under his control in an effort to prevent the loitering of persons about the premises.

5. No employee shall interfere with law enforcement officials in the performance of their duties. Furthermore, employees will cooperate with law enforcement personnel at all times.

6. No wine shall be sold with an alcoholic content of greater than 15% by volume.

7. No beer or malt beverage products shall be sold, regardless of container size, in quantities of less that [*sic*] six per sale.

8. The sale of beer or malt beverages in quantities of 22oz, 32oz, 40oz or similar size containers are prohibited.

9. Beer, malt beverages and wine coolers in containers of 16 ounces or less cannot be sold by single containers.

10. No distilled spirits shall be sold in bottles or containers smaller than 750ml.

11. No person under 21 years of age shall sell or deliver alcoholic beverages.

(Exhibit 2.)

Appellant testified that his temporary license included no conditions. However, the record does not disclose whether any of these conditions or "whereas" clauses were carried over from Dhillon's license. The remaining nine conditions prohibit the previous licensee, Balbir Dhillon, and two other individuals from participating in the

operation of the premises. The record suggests they were introduced in the course of the transfer.[2] (*Ibid.*)

Complicating the matter is the existence of a Conditional Use Permit (CUP) issued by the City of Santa Cruz for the premises in the course of Dhillon's 2008 premises-to-premises transfer of the license.[3] The CUP includes a condition prohibiting the applicant "from selling any 24 ounce or 40 ounce single serving malt liquor item." (Exhibit A, at ¶ 16.)

Initially, appellant sought the removal of all twenty conditions from his license, or, alternatively, the removal of conditions 6, 7, 8, 9, 10, and modification of condition 19. The Santa Cruz Police Department opposed the changes. (See Exhibit 3.) In a letter dated March 12, 2012, Chief of Police Kevin Vogel voiced the Police Department's objection, and cited the continuing applicability of two of the "whereas" clauses — the overconcentration of licenses and the presence of residences within 100 feet — as well as joint efforts between the City of Santa Cruz and the Santa Cruz Police Department to include language in conditional use permits discouraging the sale of low-cost single-serving containers of alcohol. (*Ibid.*) The Department therefore denied appellant's petition.

At the administrative hearing, appellant changed his request to the removal of

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[2]The existence of conditions prohibiting Dhillon's participation suggest that the Petition for Conditional License was in fact executed at some point *after* Dhillon signed the stipulation and waiver in June 2010. Nevertheless, the Conditional License itself bears a clear date of February 1, 2010.

[3]The CUP itself is undated, but includes the heading "Special Use Permit for the relocation of a high risk alcohol outlet (Liquor Store selling distilled spirits and beer and wine) from one location within a census tract to another location within the same census tract." (Exhibit A.)

conditions 7, 8, and 9, except as they pertain to malt beverages, and the removal of condition 10.

At the administrative hearing held on February 14, 2014, documentary evidence was received and testimony was presented by appellant Boota S. Samra; by the previous licensee, Balbir Dhillon, and by Mary Alsip, an associate planner for the City of Santa Cruz. Marsha Ferguson, an Alcoholic Beverage Control agent, and Warren Barry, a Santa Cruz Police Department lieutenant, testified for the Department.

After the hearing, the administrative law judge issued a decision holding that the Department had no authority to impose the conditions in the course of a person-to-person transfer. While retaining the factual findings, the Department rejected the legal conclusions reached in this decision and substituted its own, which held that it did indeed have authority under the amended Business and Professions Code section 23800, subdivisions (e) and (f), effective in 2009, and that appellant had failed to carry his burden of establishing that the grounds which prompted imposition of the conditions no longer exist, as required by section 23803. Appellant's petition to modify or remove conditions was therefore denied.

Appellant filed a timely appeal raising the following issues: (1) The Department did not have authority to impose new conditions in the course of a person-to-person transfer; (2) conditions 7 through 10 are not supported by substantial evidence; (3) conditions 7 through 10 were not a part of the settlement agreed to by the previous owner; (4) appellant was misled and forced to agree to the new conditions; (5) rule 61.4 applies only to premises-to-premises transfers, not person-to-person, and therefore cannot supply grounds for the new conditions; and (6) the conditions are confusing, contradictory, and do not comport with the Santa Cruz city conditional use permit.

DISCUSSION

I

Appellant contends that the Department had no authority to impose new conditions in the course of a person-to-person transfer. Appellant challenges the Department's reliance on Business and Profession Code section 23800(e) by directing this Board to its decisions in *Hermosa Pier 20, LLC* (2013) AB-9284 and *Hemani* (2013) AB-9385, both of which reversed conditions imposed under that provision. Appellant also insists that section 23800(f) cannot provide the Department with a blanket grant of authority to impose new conditions in the course of a person-to-person license transfer.

The Department points out that this issue was not raised at the administrative hearing. Generally, the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration on appeal. (See, e.g., *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822].)

Appellant is correct, however, that any attempts to "enlarge the scope of administrative powers are void, and that courts are obligated to strike them down." (*AFL-CIO v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-1036 [56 Cal.Rptr.2d 109]; see also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689]; *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67]; *Dept. of Alcoholic Bev. Control v. Miller Brewing Co.* (2008) 104 Cal.App.4th 1189, 1198-1199 [128 Cal.Rptr.2d 861].) We agree with appellant's assertion that an enlargement of administrative power is unenforceable as a matter of law. Moreover, a void judgment is subject to collateral attack at any time. (See, e.g., *Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 149 [119

Cal.Rptr.3d 300].)

Section 23800 has undergone recent legislative revision. Prior to 2008, the statute read, in pertinent part:

> (e)(1) At the time of a transfer of a license pursuant to Section 24071.1, 24071.2, or 24072 and upon written notice to the licensee, the department may adopt conditions that the department determines are reasonable pursuant to its investigation, or that are requested by the local governing body, or its designated subordinate officer or agency in whose jurisdiction the licensee is located. The request for conditions shall be supported by substantial evidence that the problems on the premises or in the immediate vicinity identified by its designated subordinate officer or agency, will be mitigated by the conditions.

Section 24070, which governs person-to-person transfers, is notably absent from this version of the statute.[4] In *Hemani* and *Hermosa Pier*, which involved transfers that took place in 2002 and 2008, respectively, the Department exceeded its authority by relying on this version of the statue to impose conditions in the course of a section 24070 transfer. Accordingly, we reversed.

In 2008, however, the legislature amended section 23800 to include a new provision:

> The department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges in the following situations:

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[4]In 2012, section 23800, subdivision (e), was amended to explicitly include section 24070 transfers. (See Bus. & Prof. Code § 23800, as amended by Stats. 2012, ch.327, § 7.)

The Department, in its decision, argues that the omission of section 24070 from the earlier version of section 23800(e) was in fact a typographical error on the part of the legislature. The Department offers no legislative history or other evidence to support this conclusion. Even if we assume that the legislature unintentionally omitted reference to section 24070, the Department has no authority to correct legislative errors based solely on its own inferences and assumptions. Section 24070 is undeniably absent from the version of section 23800(e) applicable to this case; the Department therefore cannot rely on section 23800(e) as authority to impose the conditions at issue.

[¶ . . . ¶]

> (f) At the time of a transfer of a license pursuant to Article 5 (commencing with section 24070) of Chapter 6.

(Bus. & Prof. Code § 23800, as amended by Stats. 2008, ch. 254, § 1. The amended statute took effect on January 1, 2009. (*Ibid*.) Thus, as of that date, the plain language of section 23800, subdivision (f), has granted the Department the authority to impose new reasonable conditions in the course of a person-to-person license transfer.

In this case, the Petition for Conditional License was executed in 2010. The Department therefore did *not* have authority to impose new conditions under section 23800, subdivision (e), which made no reference at the time to person-to-person transfers conducted under section 24070. It *did*, however, have authority to impose new conditions under section 23800, subdivision (f), which went into effect the previous year.

The original decision below — drafted by the ALJ and subsequently rejected by the Department — held that section 23800(f) did permit conditions in this person-to-person transfer:

> Since Business and Professions Code Section 23800(f) applies to person-to-person transfers of licenses, it may appear that the words "Section 23800(f) in the "Whereas clause" apply to Conditions 7 to 10. However, it is important to note the words "pursuant to" in the clause. Those words indicate that the words "Section 23800(f)" need to be read in conjunction with the Santa Cruz Police Department's request for conditions. But there is nothing in that code subdivision about requests by local agencies. Therefore, the Santa Cruz Police Department's request, as a matter of fact and law, could not be "pursuant to" Section 23800(f).

(Proposed Decision, Determination of Issues II.) Subdivision (f), however, grants the Department broad authority to impose reasonable conditions in the course of a person-to-person transfer. It is true that, unlike other subdivisions of section 23800, subdivision

(f) does not specifically refer to requests by local agencies. The absence cannot be construed as a limitation, however; nothing in the statute prohibits the imposition of conditions at the request of local law enforcement, provided the conditions meet section 23800's general requirements of reasonableness. According to the ALJ, no condition could be imposed "pursuant to" subdivision (f), because subdivision (f) does not expressly and specifically address grounds for the imposition of conditions. We cannot accept this interpretation of the law as it would render the statute a nullity and preclude its obvious intent to enable the Department to impose "reasonable conditions" on a person-to-person license transfer. "An interpretation that renders statutory language a nullity is obviously to be avoided." (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357 [19 Cal.Rptr.2d 882].)

Appellant contends that the Department's broad reading of section 23800(f) leaves "no constitutional protection against the power of the Department, and insofar as it applies to person-to-person transfers, a complete disregard for the requirements that the conditions be reasonable and supported by substantial evidence, or that the conditions have a nexus to the purpose for which the conditions were imposed." (Appr.Br. at p. 9.) This is untrue. The conditions must still be "reasonable," as required by the introductory paragraph of section 23800. Merriam-Webster defines "reasonable" as "being in accordance with reason," "not extreme or excessive," or "moderate, fair." (Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/reasonable> [as of September 11, 2014].) Even under the broad language of section 23800(f), the Department may not impose conditions that are arbitrary, unjustifiable, or unfair. Indeed, the constitutional guarantees of due process and equal protection require that all statutes "must be reasonable, not arbitrary, and must rest upon some ground of

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 734 [114 Cal.Rptr. 460].)

Moreover, in order to be enforceable, the conditions must not be vague, and must provide grounds sufficient to inform the licensee of the problems the condition was designed to mitigate. (See, e.g., *Dirty Bird Lounge* (2014) AB-9401, at pp. 5-14 [authority existed under section 23800(f), but conditions vague and unreasonable and therefore unenforceable]; *Williams* (2007) AB-8555, at pp. 2-5 ["It is fundamentally unfair not to let the licensee, who must comply with the conditions, know what problems the conditions are designed to mitigate"]; *Cho* (2000) AB-7379 [grounds cited held insufficient, left the licensee with the "impossible burden of showing a change in circumstances].) Appellant's concern that section 23800(f) grants unrestrained authority is therefore misplaced.

Alternatively, appellant directs us back to the reasoning employed in the ALJ's original decision — specifically, the conclusions of law surrounding section 23800(f) that the Department explicitly rejected. Both appellant and the ALJ, however, seem to conclude that the Santa Cruz Police Department itself imposed the conditions, and not the Department. (See App.Br. at p. 9.) They reason that section 23800(f) does not grant the Santa Cruz Police Department authority to impose conditions. There is no evidence, however, to indicate that anyone but the Department imposed the conditions, and as discussed, nothing in section 23800(f) prohibits the Department from considering law enforcement input when imposing any conditions.

II

Appellant also contends that the conditions are not supported by substantial evidence. As noted above, section 23800(f) requires that any conditions the Department imposes be reasonable. It does not require that they be supported by substantial evidence.

More importantly, it is undisputed that appellant signed the Petition for Conditional License containing both the conditions at issue and the grounds for imposing them, as referenced above. (See Petition for Conditional License, Exhibit 2.) If he believed the conditions were unreasonable at the time, he could have refused to sign and then litigated the matter; alternatively, he could have backed out of the sale and license transfer. He did neither. Appellant therefore conceded that the conditions were reasonable, and has no grounds to challenge them now. (See, e.g., *Duckhaus, Inc.* (2014) AB-9374, at pp. 8-9.)

Appellant's only recourse after the fact is a Petition to Modify or Remove Conditions under section 23803 — which is precisely what he filed in this case. Section 23803 places the burden of proof on the appellant to show that the grounds for the conditions no longer exist, not the Department. (Bus. & Prof. Code § 23803; see also *Duckhaus, Inc.*, *supra*, at pp. 4-8.) Appellant does not even attempt to carry this burden of proof. His contention that the conditions are not supported by substantial evidence is little more than an attempt to shift the burden of proof onto the Department.

III

Appellant contends that the previous license holder, Balbir Dhillon, did not agree to new conditions when he executed the stipulation and waiver imposing a penalty of revocation stayed to permit license transfer. Appellant contends Dhillon would not have

agreed to the conditions, as their presence would make it significantly more difficult to sell the business.

As noted above, it is unclear from the record which, if any, of the conditions were carried over from Dhillon's license. On this point, however, the question is irrelevant. The conditions were not applied to Dhillon's license, they were applied to appellant's — Dhillon therefore had no say in their existence.

Dhillon, in his testimony and in his letter to the Department dated January 26, 2011, argues that he would not have signed the stipulation and waiver had he known the Department would impose conditions on the next licensee. (Exhibit D; RT at pp. 23-28.)

A cursory review of the stipulation and waiver reveals the Department made no promises regarding conditions on future licenses, nor does Dhillon allege that such promises were made verbally. (See Exhibit B; RT at pp. 18-31.) Indeed, Dhillon conceded that he has never challenged the validity of his stipulation and waiver. Appellant is essentially launching a collateral attack by pleading fraudulent inducement on Dhillon's behalf — something he cannot do.

Moreover, even if Dhillon had independently and successfully challenged his stipulation and waiver, the outcome would be of no assistance to appellant — Dhillon would still hold the license, at least until the accusation was resolved. Given that the accusation addressed a third sale to a minor at the premises, a hearing on the matter might very well have resulted in outright revocation, leaving no license for Dhillon to transfer. Even if the accusation were ultimately dismissed and appellant purchased the premises from Dhillon as part of an ordinary sale, the Department would still have authority to impose new conditions in the course of that transfer. (See Part I, *supra*;

Bus. & Prof. Code § 23800(f).) Simply put, a transferor has no influence over conditions placed on a transferee's license.

Only appellant's agreement matters, and it is undisputed that he signed the Petition for Conditional License. Dhillon's stipulation and waiver is utterly irrelevant.

IV

Appellant contends that he was "misled" and "forced" into signing the conditional license. Appellant argues that had he not accepted the conditions, he would have lost his business. Moreover, appellant insists the Department's representative promised that he could remove the conditions if he operated the business for a year with no disciplinary issues.

Appellant directs this Board to its decisions in *Hermosa Pier 20, LLC* and *Hemani*. In both cases, we reversed decisions upholding conditions imposed in the course of a person-to-person transfer. The determinative factor in these two cases, however, was not the Department's take-it-or-leave-it stance, but the fact that *it did not have authority to impose the conditions* to begin with. Expressed another way, these decisions held the conditions void *in spite of* the appellants' undisputed agreement, because the agreements were elicited through reliance on nonexistent authority.

In *Hermosa Pier*, for example, we agreed with the appellant's position that "(a) the Department lacked the power to impose conditions in connection with a person-to-person transfer, and (b) established law requires that the conditions extracted through use of that purported power be stricken." (*Id.* at pp. 5-6.) In that case, both appellant and a neighboring restaurant, Il Boccaccio, faced similar new conditions in their respective Petitions for Conditional License. (*Id.* at pp. 3-4.) The appellant felt forced

to agree to the conditions due to financial pressures. (*Id.* at p. 8.) Il Boccaccio, on the other hand, objected to the conditions, litigated, and won on the grounds that the Department had no authority to impose the conditions under section 23800(e). (*Id.* at pp. 3-4.) Following the ruling in Il Boccaccio's case, the appellant sought removal of its own conditions based on the Department's lack of authority to impose them. (*Id.* at p. 4.) The Department, in its decision, held that the appellant, having agreed to the conditions, could not later challenge them on any grounds. (See *id.* at p. 5.) We reversed, holding that the Department exceeded its authority in imposing the conditions, and the conditions were therefore void. (*Id.* at pp. 8-9.)

Similarly, in *Hemani*, an appellant negotiated with the Department and law enforcement regarding new conditions imposed in the course of a transfer. Ultimately, the appellant agreed to the conditions. Later, he challenged them on the grounds that the Department lacked authority to impose them under section 23803(e). Again, we held that the Department exceeded its powers and the conditions were therefore void. (*Id.* at pp. 12-13.)

In a particularly relevant portion of *Hemani*, we observed that "[a] compromise on conditions cannot truly be called voluntary where the Department, in conjunction with law enforcement, has led a licensee to believe his business is at stake. The Department simply held a metaphorical gun to the licensee's head — a gun the Department was not legislatively authorized to possess." (*Id.* at pp. 8-10.) The important factor in both *Hemani* and *Hermosa Pier 20* was that the appellants' businesses *were not actually at stake* — the Department had no authority under section 23803(e) to impose new conditions in the course of a person-to-person transfer, but

represented to both appellants that it did. Legally, the appellants could have rejected the conditions with no repercussions.

As noted in Part I, however, both *Hemani* and *Hermosa Pier* predated the enactment of section 23800, subdivision (f). When the events in the present case took place, the Department did in fact have authority to impose new conditions under the new provision. The Department's take-it-or-leave it stance was, in this case, fully supported by law. Appellant's decision to agree to the conditions is therefore binding.

Appellant counters with testimony that Department Agent Ferguson assured him he could have the conditions removed in a year. "The Department," he claims, "acted outside the realms of good faith and fair dealing when Ms. Ferguson told Mr. Samra he should accept the conditions because in a year he could apply to modify them [RT: 68:19-24], while it was the policy of the Santa Cruz Police Department to refuse all modification requests [RT:111:6-10]." (App.Br. at p.12.)

Appellant misstates the testimony. On direct examination, Agent Ferguson testified as follows:

> Q You were present when the Petitioner, Mr. Samra, testified today, correct?
>
> A Yes.
>
> Q And did you hear him state that you told him that there would be no problem in removing the conditions after a one year period of time?
>
> A Yes, I did.
>
> Q And did you tell him such a thing?
>
> A No, I did not.
>
> Q Do you recall what you would tell him?
>
> A I would tell him, and any other applicant that had conditions on their

> license, that they could apply to modify the conditions or remove the conditions after one year. It's never a guarantee that they will be removed or modified.

(RT at p. 68.) According to Agent Ferguson's testimony, she did not advise appellant that he "should" accept the conditions. She did testify that she would have warned appellant, and any other applicant, that there is no guarantee the conditions will be removed. Even if her actual comments were less clear than her testimony suggests, appellant's ignorance of the law is no defense.

On cross-examination, Lieutenant Barry testified regarding the Police Department's position on modifications:

> Q Okay. And the stores that haven't gotten in trouble quote/unquote "with the ABC," the police are not supporting a condition be imposed; is that correct?
>
> A We, as a city, are no longer allowing people to modify their conditions with any type of alcohol service. We recognize that alcohol plays a part in crime and there have been restaurants, there have been clubs that have wanted to change their hours of operation, the type of alcohol they want to serve, and we've been opposed to it.
>
> Q So it really wouldn't matter what these conditions were if anytime any alcohol provider wants to modify a condition, the police will not support it?
>
> [Objection; overruled.]
>
> THE WITNESS: Can she ask the question again, your Honor?
>
> JUDGE LO: Is the city's policy now to no longer support modifications or removal of the conditions?
>
> THE WITNESS: I wouldn't say it's the policy, but it's the stand we're taking.
>
> JUDGE LO: And the stand is the police department or city council or what?
>
> THE WITNESS: The police department and city council.
>
> JUDGE LO: All right. Next question.

> Q BY MS. WILLIAMS: So it really wouldn't matter whether the conditions had changed in this location, the police department would vote against removing the conditions, is that correct?
>
> [Objection; overruled.]
>
> THE WITNESS: Can she ask again, please?
>
> JUDGE LO: Well, no matter what the reasons for the conditions and no matter what changes have occurred, it's the city's position that it still does not support modification?
>
> THE WITNESS: Correct.
>
> JUDGE LO: All right.
>
> THE WITNESS: And they're heavily scrutinized.

(RT at pp. 112-114.) There are three problems with appellant's interpretation of this testimony. First, it is the Department, and not local law enforcement, that has the final say in whether a condition is modified. (See Bus. & Prof. Code § 23803.) Local governing authorities do have the right to object, and the Department may not remove or modify a condition over such an objection without holding a hearing. (*Ibid*.) But ultimately, a joint "stand" by law enforcement and local authorities against modifications is far from determinative. Moreover, Lieutenant Barry testified only about local authorities' general stance on modification, not on documented policy. The position does not appear to be an absolute refusal. Lieutenant Barry commented that such requests are "heavily scrutinized" — suggesting that in some instances, they may pass scrutiny and local authorities may choose not to object. Finally — and most importantly — the stance of local authorities is irrelevant where, as here, appellants make no attempt to show a change in the circumstances that led to the conditions being imposed, as required by section 23803.

V

Appellant contends that rule 61.4 does not apply to person-to-person transfers and therefore cannot provide grounds for new conditions on appellant's license.

Rule 61.4 states, in relevant part,

> No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either of the following conditions exist:
>
> (a) The premises are located within 100 feet of a residence.
>
> [¶ . . . ¶.]
>
> This rule does not apply where the premises have been licensed and operated with the same type license within 90 days of the application.
>
> Notwithstanding the provisions of this rule, the department may issue an original retail license or transfer a retail license premises-to-premises where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents.

(Cal Code. Regs., tit. 4, § 61.4.) There is nothing in the rule that permits its application in the course of a person-to-person transfer. Appellant is correct when he asserts that the purpose of the rule is to restrain the issuance of new licenses near residences, or to restrict movement of existing premises into residential neighborhoods. (See App.Br. at p. 13.)

We see nothing in rule 61.4, however, that prevents the Department from imposing new conditions in the course of a person-to-person transfer in order to address rule 61.4 concerns *where rule 61.4 is already cited as grounds* in the previous license.

To illustrate, an initial licensee may be granted a new license with certain limited conditions, with rule 61.4 cited as grounds in a "whereas" clause. In the course of

operation, however, it may become apparent that the conditions imposed were insufficient to ensure neighboring residents' quiet enjoyment. When the initial licensee transfers her license to another party, the Department has authority to impose new conditions, and may rely on rule 61.4 as grounds, because rule 61.4 was cited in the license before the person-to-person transfer took place.

Unfortunately, the record in this case does not disclose whether the rule 61.4 grounds existed on the previous license. Dhillon, the previous licensee, executed a premises-to-premises transfer in 2008. At that point, the Department could legitimately have introduced rule 61.4 as grounds.

Moreover, the record suggests that at least some conditions — though not those challenged by appellant — existed on Dhillon's license. Agent Ferguson testified regarding the new conditions on appellant's license:

> JUDGE LO: Do you know who crafted these conditions?
>
> THE WITNESS: I typed them up myself. But the recommendation was from the police department, as noted.
>
> JUDGE LO: All of these conditions or just some?
>
> THE WITNESS: I believe five of them were part of the original license.

(RT at p. 78.) If the rule 61.4 grounds were carried over from Dhillon's license, then appellant would have to prove a change in circumstances regarding residences within 100 feet. If not, then the Department cannot rely on the rule, and appellant would be excused from his burden of proof regarding those grounds alone.

Though the record does not equip us to reach a conclusion on rule 61.4, the oversight is not fatal to the Department's case. Appellant's license cites other grounds, including an overconcentration of licenses and the input of local law enforcement.

Though appellant launches a collateral attack on law enforcement's role in imposing conditions, he does not carry his burden of showing its concerns are unjustified, nor does he show that the concentration of licenses has changed. Appellant does not even attempt to carry his burden of proof under section 23803, and therefore has no case.

VI

Appellant contends the conditions are confusing, contradictory, and at odds with the CUP issued by the City of Santa Cruz. Appellant claims that condition 7, which states that "[n]o beer or malt beverage products shall be sold, regardless of container size, in quantities of less that [*sic*] six per sale," is beyond reason because these beverages are not normally sold in six-packs.

We note first that nothing in the condition requires that the beverages be *packaged* in six packs, only that they not be sold in quantities of less than six per sale. Whether these beverages are "normally" sold in six-packs is irrelevant, as the condition does not impose any packaging requirements.

Moreover, we see absolutely no contradiction between the CUP and the conditions on appellant's license. The CUP restriction is indeed limited — it provides only that appellant may not sell "any 24 ounce or 40 ounce single serving malt liquor item." The license conditions are certainly more stringent, but in no way contradict the CUP. Appellant has not cited any authority that requires that license conditions be identical to CUP provisions. Finally, appellant has not shown us how the license conditions could possibly be seen as confusing or internally inconsistent. On the contrary, the conditions are quite clear.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.