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

AB-9456
File: 47-427913 Reg: 13079245

177 Eddy Street, LLC,
dba Pandora
177 Eddy Street, San Francisco, CA,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 2, 2015
Sacramento, CA

ISSUED APRIL 28, 2015

177 Eddy Street, LLC, doing business as Pandora (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] denying its petition to modify a license condition pursuant to Business and Professions Code section 23803.

Appearances include appellant 177 Eddy Street, LLC, through its counsel, Mark Rennie, and the Department of Alcoholic Beverage Control, through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellant's current on-sale general public eating place license was issued in the course of a premises-to-premises transfer on January 24, 2007. The license and the

[1]The decision of the Department pursuant to Government Code section 11517(c), dated July 3, 2014, is set forth in the appendix.

conditions attached have gone through a number of changes. Initially, the appellant limited liability company, under different ownership, was granted an on-sale beer and wine public eating place license. In 2003, appellant applied to double transfer (person-to-person and premises-to-premises) an on-sale general public eating place license to the premises (the "2003 application"). Among other things, this allowed appellant to serve distilled liquors. During the course of the 2003 application, the Department received protests from the San Francisco Police Department (SFPD) and from the San Francisco Christian Academy, one of several consideration points in the vicinity of the licensed premises. Based upon these protests and the agreement of appellant, seven conditions were imposed on the license, including a provision restricting the sale of alcohol to the hours of 11:00 a.m. to 12:00 midnight on Sundays through Thursdays and 11:00 a.m. to 2:00 a.m. on Fridays and Saturdays.

In 2005 and 2007, appellant was disciplined for violating license conditions based on the service of alcoholic beverages in the unlicensed basement area of the premises.

In 2005 — during roughly the same time frame as its sales violations — appellant applied for a premises-to-premises transfer in order to expand its sales of alcoholic beverages into the basement area (the "2005 application"). At the time, there were between fifty and one hundred residences located within one hundred feet of appellant's premises, as well as three consideration points, including a church, a park, and a religious school. The SFPD and the chaplain of the school, the San Francisco Christian Academy, filed protests against appellant's expansion.

Ultimately, appellant executed a Petition for Conditional License containing thirteen license conditions, including condition 1, at issue in this case, which limited

alcoholic beverage sales to the hours to 11:00 a.m. to 11:00 p.m. each day of the week. The Department licensing representative recommended conditional approval of the transfer, resulting in issuance of the current license on January 24, 2007.

In March of 2011, appellant applied to modify condition 1 on its license to permit sales of alcoholic beverages from 11:00 a.m. to 2:00 a.m. each day of the week. The Department sent letters to all residents within 100 feet and to the remaining consideration points, including the chaplain of the San Francisco Christian Academy who had protested the 2005 transfer application, notifying them of appellant's request to extend its hours. The Department received no response.

The Department also sent a letter to the SFPD informing them of the request. In a letter dated May 5, 2011, the SFPD notified the Department that it opposed appellant's request. The letter did not describe the reasons for its opposition.

Appellant has no disciplinary action under its current license. There have been no complaints from neighbors about appellant's premises.

At the administrative hearing held on December 12, 2013, documentary evidence was received and testimony concerning the violation charged was presented by Carolina Suson, a Department licensing representative; by Timmy Choy, appellant's managing partner; and by Jeff Ng, appellant's manager.

On January 8, 2014, the administrative law judge (ALJ) issued a proposed decision granting appellant's request to modify condition 1 consistent with appellant's petition. Initially, the Department adopted the ALJ's proposed decision and certified it as the Department's final decision on February 14, 2014. On March 12, 2014, however, prosecuting counsel for the Department petitioned the Department — in its decision-making capacity — to reconsider its final decision pursuant to Government Code

section 11521. The Department granted the petition for reconsideration on March 14, 2014. Ultimately, the Department rejected the ALJ's proposed decision pursuant to Government Code section 11517(c) and substituted its own decision denying appellant's petition.

Appellant filed this timely appeal raising the following issues: (1) the Department decision denying modification of condition 1 is not supported by substantial evidence, and (2) there was no valid basis for imposing condition 1 in the course of the 2005 premises-to-premises transfer application.

DISCUSSION

Appellant contends the Department's decision reversing that of the ALJ, issued pursuant to Government Code section 11517(c), is not supported by substantial evidence in light of the whole record.

The scope of the Appeals Board's review is limited by the California Constitution, statute, and case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is authorized to determine, among other things, whether the Department's decision is supported by the findings and the findings by substantial evidence. Together, these phases of analysis form the foundation of a valid decision, and reveal the agency's mode of reasoning. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Hutchins*) (1981) 122 Cal.App.3d 549, 555, [175 Cal.Rptr. 342]; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836].)

Where, as here, the findings are attacked on the grounds that there is a lack of substantial evidence supporting them, the Appeals Board, after considering the entire

record, must determine whether there is substantial evidence to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372 [144 Cal.Rptr. 851].) "Substantial evidence" is relevant evidence which reasonable minds would accept as a rational support for a conclusion. (*Universal Camera Corp. v. National Labor Relations Bd.* (1950) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales USA, Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The Department's authority for the imposition of conditions is contained in section 23800, subdivision (a), which provides in relevant part:

> The department may place *reasonable conditions* upon retail licensees or upon any licensee in the exercise of retail privileges in the following situations:
>
> (a) 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 those grounds may be removed by the imposition of those conditions.

(Bus. & Prof. Code § 23800(a), emphasis added.) Section 23800 does not define "reasonable," nor has the Department adopted any regulation defining how a "reasonable condition" differs from an "unreasonable" one. The Board has, however, explained that the word "reasonable" as used in section 23800 requires a "'connection, tie, [or] link . . . between the problem sought to be eliminated and the condition designed to eliminate the problem." (*Greenwater Investments, Inc*. (1996) AB-6585, p. 4; see also *Billy T's Olgas, Inc*. (2003) AB-7911, at p. 9; *Super Center Concepts, Inc.* (2001) AB-7620, at p. 4; and *Crenshaw* (1996) AB-6580, at p. 6.)

Business & Professions Code section 23803, which must be read in *pari materia* and harmonized with section 23800, provides, in pertinent part, that the "department,

upon . . . petition of a licensee . . ., if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification." We have stated that for these two applicable code sections to make sense when read together, "the requirements for modification of a condition are essentially the same as those for removal." (*Greenwater Investments, Inc*., *supra,* at p. 4, fn. 4.) In other words, the Department's "satisfaction" referenced by section 23803 cannot be sated or exercised by whim or caprice, but must be "reasonable." This means the Department, in granting or denying a petition by a licensee for modification of an existing condition, must act reasonably and not arbitrarily, that its decision must be "governed by reason . . . or according to the dictates of reason." (See Black's Law Dict. (5th ed. 1979) p. 1138.) For an adjudicative decision by a court or administrative agency to be respected and accepted, it must embody reason, and no decision is acceptable "unless based on the canons of logical thinking." (Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking (1997 ed.) p. xxvi.)

Appellant's petition for Conditional License, signed by its representative Suhua Zou on September 13, 2005, recited the following grounds for the imposition of various license conditions:

> WHEREAS, petitioners has [*sic*] filed an application for the issuance of the above referred-to license for the above-mentioned premises; and,
>
> WHEREAS, the proposed premises and/or parking lot, operated in conjunction therewith, are located within 100 feet of residences; and,
>
> WHEREAS, the issuance of the applied-for license without the below-described conditions would interfere with the quiet enjoyment of the property by nearby residents and constitute grounds for the denial of the application under the provisions of Rule 61.4, of Chapter 1, Title 4 of the California Code of Regulations; and,
>
> WHEREAS, the proposed premises is within 600 feet from three

consideration points; 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 is located in Census Tract 0125. [*sic*] where there presently exists an undue concentration of licenses as defined by Section 23958.4 of business [*sic*] and Professions Code; and,

WHEREAS, the proposed premises are located in a crime reporting district that has a 20% greater number of reported crimes, as defined in subdivision (c) of Section 23958.4, than the average number of reported crimes as determined from all crime reporting districts with the jurisdiction of the local law enforcement agency; and,

WHEREAS, the petitioners stipulate that by reason of the aforementioned high crime and overconcentration of licenses, grounds exist for denial of the applied-for license; and,

WHEREAS, protests have been filed against the issuance of the applied-for license; and,

WHEREAS, the privilege conveyed with the applied-for license requires that the petitioner operates the premises, in good faith, as a Bona Fide Public Eating Place; and,

WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals. . . .

(2005 Petition for Conditional License, Exh. 2.)

Given these grounds, the Department carried over the conditions imposed in the course of appellant's 2003 application and added several new conditions, including condition 1 further restricting appellant's hours of operation. (Compare 2003 Petition for Conditional License, Exh. B, with 2005 Petition for Conditional License, Exh. 2.) Condition 1 requires that "[s]ales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 11:00 p.m. each day of the week." (2005 Petition for Conditional License, Exh. 2.) Previously, appellant's license

had permitted sales from 11:00 a.m. to midnight, Sunday through Thursday, and 11:00 a.m. to 2:00 a.m. on Fridays and Saturdays. (2003 Petition for Conditional License, Exh. B.)

Appellant now seeks to modify condition 1 to allow sales of alcohol from 11:00 a.m. to 2:00 a.m. every night of the week.

In its decision denying appellant's petition for modification of condition 1, the Department cited the continued presence of rule 61.4 residences near the licensed premises, the undue concentration of licenses and high crime rate in the vicinity of the licensed premises, and an objection to the modification by the SFPD.

A. The 61.4 Residence Ground

With regard to the residences, rule 61.4 reads, 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.
>
> (b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence.
>
> [¶ . . . ¶]
>
> 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.)

Appellant provided the following undisputed evidence to support its contention that its operation would not interfere with the quiet enjoyment of nearby residences:

– Appellant has been operating at the location for six years (now nearly seven)

without any complaint from any of its neighbors[2];

– Appellant has installed of security cameras and employed of security guards to ensure that noise from patrons gathered outside or in the proximity of its entrance does not disturb surrounding residences; and

– Appellant has invested significant financial resources to soundproof the licensed premises so that noise from within the premises does not disturb those outside the premises.

The Department dismissed the evidence appellant provided, stating that:

> Nothing has changed with respect to the existence of such circumstances — there continue to be numerous 61.4 residences and several consideration points. The licensee's voluntary undertakings in installing security cameras and employing security guards may well be commendable, and may even be evidence that the licensee is trying to be a good neighbor. However, these are not the statutory bases upon which the Department may modify the condition. Moreover, these voluntary efforts could just as quickly be undone upon modification of the subject condition.

(Determination of Issues II.)

We cannot accept the Department's assessment. There is no evidence in the record to support the Department's opinion that the measures appellant has taken will be insufficient, nor has the Department provided any evidence to support its cynical

---

[2]In its brief, the Department argues that the fact that no neighbor has complained about the noise from the licensed premises over the last several years is likely because the conditions are working. (Dept.Br. at p. 6.) This speculative conclusion ignores the fact the Department received no objection to the instant request for modification of condition 1 from any of the neighboring residents or nearby consideration points, although all of them were notified, and at least one — the San Francisco Christian Academy — has objected in the past. The purpose of the Department's notification to surrounding residents and others is to determine whether opposition exists to the modification of an existing condition. Absence of opposition is evidence that those most affected by the proposed modification of the operating hours do not believe it would cause them any problems.

suspicion that appellant might eliminate such measures as soon as the condition is modified. Indeed, other conditions remaining on appellant's license for which it seeks no modification suggest the opposite. For instance, condition 11 provides "No noise shall be audible beyond the area under the control of the licensees," and condition 12 states "Petitioners shall not permit their patrons or the general public to loiter or congregate on the sidewalks adjacent to the licensed premises." (2005 Petition for Conditional Licenses, Exh. 2.) These conditions apply regardless of the hours in which the licensed premises is allowed to sell alcohol, and are enforceable by the Department so long as the license remains in effect, or until they are formally modified or removed. (See Business & Professions Code §§ 23800, 23803 & 23804.)

Significantly, appellant has been operating under these conditions for the last several years without any disciplinary action. It is reasonable to infer that appellant would continue to take all steps necessary to ensure compliance, including the use of security cameras and the employment of security guards to prevent loiterers. As such, we find the Department's stated grounds for denying the modification speculative and not supported by substantial evidence. Because there is extensive, undisputed evidence that appellant has not and will not interfere with the quiet enjoyment of property by nearby residents, the Department's determination that appellant had not met its burden regarding rule 61.4 residences is supported not by substantial evidence, but by mere conjecture.

B. The Problem of Undue Concentration and High Crime

In regard to undue concentration and high crime, the Department found as follows:

[I]t is . . . undisputed that these continue to exist. While the ALJ opined in

> his proposed decision that these particular factors are only relevant during the initial issuance of a license in establishing whether or not a determination of public convenience or necessity is necessary, and it is questionable whether they may be used as the bases for imposing a condition on a license, that issue has not been raised by Petitioner. In contrast, however, Petitioner did agree that these factors were relevant during the [earlier] issuance of the license by execution of the Petition for Conditional License, and further acknowledged that the conditions imposed upon the license would mitigate concerns [and] that issuance of the license without such conditions would contribute to crime problems in the area that may reasonably be attributed to a high concentration of licenses. It would be disingenuous, at best, to now contend that these concerns are irrelevant. In the end, Petitioner did not meet its burden of establishing that the area is no longer "high crime" or that there is no longer an "undue concentration" of licenses.

(Determination of Issues III.)

This is a classic example of an informal (material) fallacy, specifically the fallacy of irrelevance, or *ignoratio elenchi*.[3] (Aldisert, *supra,* at pp. 170-171.) First, the Department's decision sidesteps the ALJ's finding that the concentration of licenses in the area and nearby residences are only relevant during the initial issuance of the license and not for later imposition of conditions by claiming this argument has not been raised by appellant. But appellant challenges whether the condition of restricted operating hours the Department seeks to continue is still, according to the evidence presented, "reasonable," a claim that necessarily encompasses the question of whether the operating hours condition has anything to do with the concentration of other licenses in the vicinity and the area's high crime rate.

Second, the Department employs a "strawperson" argument by attributing to appellant a position it never asserted — *i.e.*, that these "concerns are irrelevant."

---

[3]Ignoratio elenchi is defined as "An advocate's attempt to prove something by marshaling evidence that is immaterial." (See Black's Law Dict. (10th ed. 2014) p. 864, col. 2.)

(Determination of Issues III.) Appellant instead contends these "concerns," while relevant, have been eliminated with respect to condition 1 by "changed circumstances" — the absence of protests — and by specific actions appellant has taken.

Third, the Department again uses a "strawperson" argument to attribute an inaccurate position to appellant when it claims that appellant's acceptance of the reduced operating hours condition in 2005 amounts to an "acknowledg[ment] . . . that issuance of the license without such conditions would contribute to crime problems in the area that may reasonably be attributed to a high concentration of licenses." (Determination of Issues III.) While appellant did agree to the condition 1 on its license to mitigate concerns regarding noise in the area surrounding the licensed premises, that agreement does not preclude a later petition to alter that precise condition due to changed circumstances — for example, soundproofing and the addition of security guards and surveillance cameras.

Nor is it clear from the record *how* allowing the sale of alcoholic beverages for on-premises consumption until 2:00 a.m. could, given the presence of numerous similar licensed premises in the area operating until that same hour, enhance the concentration of licenses (since appellant already has a license) or aggravate crime. (RT at p. 73.) Appellant was formerly allowed to sell alcoholic beverages until 2:00 a.m. on Fridays and Saturdays at the same premises. (2003 Petition for Conditional License, Exh. B.) When appellant sought to expand its operation by adding karaoke in the basement of the premises in 2005, the Department, apparently concerned about additional noise from karaoke that may disturb the surrounding residences, cut the hours of operation back to 11 p.m. for every night of the week. (2005 Petition for Conditional License, Exh. 2.)

Significantly, the "whereas" clauses relating to crime and undue concentration of licenses on the 2003 Petition for Conditional License are substantively identical to those on the 2005 Petition for Conditional License.[4] Also, testimony at the administrative hearing established that the SFPD did *not* request that the hours be reduced in 2005:

> THE COURT: All right. Who else protested in 2005?
>
> [LICENSING REPRESENTATIVE SUSON]: San Francisco Police Department. They withdrew because of -- the conditions were imposed.
>
> THE COURT: Okay. Did the San Francisco Police Department recommend that the hours be reduced?
>
> THE WITNESS: No.
>
> THE COURT: Then who came up with the reduction in hours?
>
> THE WITNESS: The Department.

---

[4]Compare the "whereas" clauses on the 2005 Petition for Conditional License, pages 6 through 7, *supra*, with the following:

> 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 #0125. [*sic*] where there presently exists an undue concentration of licenses as defined by Section 23958.4 of the Business and Professions Code; and,
>
> WHEREAS, the proposed premises are located in a crime reporting district that has a 20% greater number of reporter crimes, as defined in subdivision (c) of Section 23958.4, than the average number of reported crimes as determined from all crime reporting districts with the jurisdiction of the local law enforcement agency; and,
>
> WHEREAS, the petitioner stipulates that by reason for the aforementioned high crime and over concentration of licenses, grounds exist for the denial of the applied-for license;. . .

(2003 Petition for Conditional License, Exh. B.)

THE COURT: Based on what?

THE WITNESS: Based on the same whereases.

(RT at p. 35.)

Examination of these "whereas" clauses shows appellant did not stipulate to anything different regarding crime and undue concentration in 2005 than it did in 2003 when it was allowed to sell alcohol on weekends until 2:00 a.m. That, coupled with the fact the SFPD never requested a reduction in hours in 2005, shows that appellant's operating hours were not considered linked or tied to the undue concentration of licenses and crime — the grounds alleged by the Department for the SFPD's objection to appellant's instant petition for modification of its operating hours.

The Department's sole witness at the administrative hearing testified that the more restrictive operating hours condition was imposed by the Department in 2005 because of a protest from a nearby parochial school, the San Francisco Christian Academy. (RT at p. 18.) This in itself seems strange as few conventional schools are in operation between the hours of 11 p.m. and 2 a.m. In any event, when appellant sought the present modification of condition 1, there were no protests or objections from any consideration points[5] or nearby residents other than the SFPD, which, as the evidence shows, did not insist on the reduced operating hours in 2005. Thus, we find it unreasonable and unfair for the Department to now use crime and undue concentration of licensees as a grounds to deny appellant's request to modify the condition 1 hours restriction, especially when, as here, concentration of licensees and crime have been

[5] "Consideration points" include, but are not limited to nearby "churches, schools, playgrounds [and] hospitals." (RT at p. 10.)

and are endemic to the Tenderloin area of San Francisco where appellant's premises are located. (RT at pp. 69-70.)

Appellant testified without contradiction that its patrons are primarily from the "'tech crowd' . . . a lot of college graduates, . . . downtown happy hour people, financial district clients, a lot of corporate events as well." (RT at p. 58.) Further, appellant testified, without evidence to the contrary, that denial of a modification of the operating hours restriction places it at an unfair advantage to nearby competing restaurants with liquor licenses permitting them to operate until 2 a.m. The result is to prevent an opportunity for improving the Tenderloin area and reducing crime by attracting more upscale visitors as patrons of appellant.

Appellant also provided undisputed evidence that there have been no complaints from neighbors regarding its operation for the last several years, and that it has installed security cameras and substantial soundproofing and employs security guards at the licensed premises. (RT at pp. 10, 75-77.) Moreover, condition 12, *supra*, provides a means by which the Department can enforce appellant's commitment to keep the adjacent premises free of loiterers. Absent any evidence to the contrary, the only reasonable inference from the evidence presented is that such measures serve to mitigate crime in the area. As such, the Department's determination that concerns over crime and undue concentration of licenses support the denial of appellant's request to modify condition 1 is not supported by substantial evidence.

Finally, in its decision, the Department makes much of the SFPD's May 5, 2011 letter in response to the Department's notification of appellant's request to modify condition 1. That letter reads:

The [SFPD] has completed its review of the above referenced request for

> modification of condition(s). The [SFPD] *is* opposed to the modification or removal of the requested conditions.
>
> *The [SFPD] recommends that all conditions remain as currently stated*.

(Report on Application for License, Jan. 25, 2006, Exh. 2, attachment F, emphasis in original.) The Department relies on this letter as an "expert opinion" that extending the hours for operation of the licensed premises would somehow contribute to the problem of crime in the neighborhood. The Department states it "serves as evidence that there are law enforcement concerns about modifying Condition 1." (Determination of Issues IV.) But this opinion letter is merely conclusory, not evidentiary; it "offers nothing beyond the mere word of" the SFPD and, as such, is entitled to little or no weight because it fails to "incorporate any *reasons for its conclusion*." (McInerny, Being Logical (2004) p. 117, emphasis added.)

The remainder of the evidence favors appellant, not the Department. "A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Kuhn v. Dept. of Gen. Services* (1994) 22 Cal.App.4th 1627, 1632-1633 [29 Cal.Rptr.2d 191], quoting *Bowman v. Bd. of Pension Comrs.* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) It would be unreasonable to impose on appellant the burden of overcoming the vague objection of "law enforcement concerns" when those concerns have not been specifically stated. As discussed above, there is substantial evidence in the record — indeed, the *only* evidence of substance — that modifying condition 1 would not aggravate the ongoing problems of over-concentration and high crime in the area. By requiring appellant to surmount vague, seemingly boilerplate objections by law enforcement as well as unsubstantiated concerns of the Department, the Department has transformed appellant's already high burden into an

insurmountable one.

C. Reconciling our Analysis with our Decision in *Duckhaus*

We recognize that language in our recent decision of *Duckhaus, Inc*. (2014) AB-9374, which dealt with a seemingly similar problem of whether to modify a license condition pursuant to a petition, appears in conflict with our analysis here and requires clarification. In *Duckhaus*, the license at issue restricted the sale, service, and consumption of alcoholic beverages to the hours of 11:00 a.m. to 10:00 p.m. each day of the week. (*Duckhaus*, *supra*, at p. 2.) Appellant petitioned in 2012 for modification of the condition to allow it to sell alcoholic beverages from 8:00 a.m. to 11:00 p.m. The Department denied the petition, and the appellant requested a hearing. (*Ibid*.)

Evidence introduced at the administrative hearing established that the original time constraint was imposed because: (1) the premises were located in a census tract with an undue concentration of licenses, (2) the premises operated within 100 feet of residences, and (3) modification of the condition would interfere with residents' quiet enjoyment of property. (*Ibid*.) In its consideration of the petition, the Department concluded that there were still eight residences within 100 feet of the licensed premises, including one which was located just 69 inches from the premises' outside patio. (*Id.* at p. 3.) The Department sent letters to each of the eight residences notifying them of the petition for modification of conditions, and the owner of the above-referenced property responded with a letter opposing the modification because of, among other things, noise concerns. (*Ibid*.) After the hearing, the Department issued a decision denying the petition, and the licensee appealed to this Board.

The appellant in *Duckhaus* argued that of the three grounds for which the

condition was imposed, only one remained and the Department failed to consider that the other grounds no longer exist. (*Id*. at p. 3.) Specifically, the appellant argued that even though there were still residences within 100 feet of the premises, the Department failed to consider that there was no longer an undue concentration of licenses in the census tract where the premises were located. (*Id*. at p. 6.) In rejecting the appellant's arguments, the Board stated:

> [T]he plain language of the statute requires that "the grounds which caused the imposition of the conditions no longer exist." (Bus. & Prof. Code § 23803.) The phrase "the grounds" is unqualified — the statute does not allow for the removal of conditions where "any" or "one of the grounds" no longer applies. Appellant cites no authority in support of such a facially unjustified construction. Moreover, a plain-language application of section 23083 [*sic*] reflects wise policy. If, as here, a condition is imposed to address multiple concerns, but the condition may be removed if any *one* of those grounds disappears, then the remaining concerns, however serious, are left entirely unaddressed. Such a misapplication of the statute would hamstring the Department's ability to use license conditions as a compromise between its responsibility to preserve public welfare and the desires of the would-be licensee. The only valid, rational interpretation of section 23083 [*sic*] is that the grounds cited — *all* of them — must, to the satisfaction of the Department (Bus. & Prof. Code § 23803), no longer exist before a condition may be removed.

(*Id*. at pp. 6-7, emphasis in original.)

Duckhaus is not controlling here because the cases are readily distinguishable on their facts. In *Duckhaus*, the appellant argued that the removal of any one ground for the imposition of a condition on a license merited removal of that condition even though it was imposed to satisfy multiple grounds. Here, in contrast, there is substantial evidence that the only valid ground for the imposition of condition 1 in 2005 — the quiet enjoyment of nearby residences — no longer exists. (See discussion *supra* at pp. 8-14.) Hence, this is not a case where appellant is requesting the "removal of conditions where 'any' or 'one of the grounds' no longer applies," but where the only valid ground

asserted for the original imposition of the condition no longer exists. (See *Duckhaus*, *supra*, at p. 7.) Unlike in *Duckhaus*, there is no nexus between condition 1 and crime or undue concentration of licenses here; the only valid ground for restricting the hours of operation in 2005 was concern about excessive noise from expansion of the premises for karaoke into the basement and an objection raised by a nearby protesting parochial school. Moreover, *Duckhaus*, unlike the petition for modification here, had a protesting neighbor. Accordingly, we find it unreasonable for the Department to now use crime and undue concentration as supplemental grounds to deny appellant's request to modify condition 1 when they apparently were not a basis for restricting the hours of operation in 2005. (See also *Dirty Bird Lounge, LLC* (2014) AB-9401 at p. 11["[I]t is the antitheses of 'reasonable' to impose on a licensee a specific condition that lacks any logical nexus to an expressly articulated ground for its existence. Indeed, such arbitrary government conduct runs afoul of the guarantee of due process."].)

We understand some language in *Duckhaus* can, when read in isolation and untethered from the facts animating it, give a different impression from what we intended. To avoid "confusion worse confounded,"[6] we now provide clarification, matching more precisely what we said with what we meant. Specifically, *Duckhaus* states that "[t]he only valid, rational interpretation of section 23083 is that the grounds cited — *all* of them — must, to the satisfaction of the Department [citation], no longer exist before a condition may be removed."[7] To begin with, that statement is *dicta*

---

[6] Milton, Paradise Lost, Book II, line 995.

[7] We reexamine our analysis in *Duckhaus* partly in response to the remark of the ALJ in this case that he was "unaware of any case law or other authority that says *all* of

(continued . . .)

because it was, for reasons above mentioned, unnecessary to the conclusion reached in *Duckhaus*. "The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as *obiter dictum* and not as the law of the case." (*Stockton Theaters Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 [304 P.2d 7].)

Second, upon further research and consideration, our description of the statutory language in *Duckhaus* is not necessarily congruent with the Legislature's grammatical choices when it comes to the drafting and parsing of statutes, specifically use of definite ("the") or indefinite ("a" or "an") articles preceding nouns. Section 23803's mention of "*the* grounds" and "*the* conditions" arguably refers to the linking of a specific "condition" to a specific ground, as opposed to reference by a specific condition to general or all "grounds." (Garner, The Redbook Manual on Legal Style (3d ed. 2002), § 10:38, p. 173; see also *Honchariw v. County of Stanislaus* (2013) 218 Cal.App.4th 1019, 1034 [160 Cal.Rptr.3d 609] ["The Legislature's use of the definitive article 'the' is significant because the definite article 'the' refers to a specific person or thing. In contrast, the use of the indefinite articles 'a' or 'an' signals a general reference."].) Thus a perfectly reasonable interpretation of "the grounds" and "the conditions" as used in section 23803 is that the Department must consider each condition and the reason for its imposition on its own terms, rather than require for the modification of a specific

---

[7](. . . continued)

the conditions have to be changed in order for a condition to be modified." (RT at p. 64, emphasis added.) Our opinion in *Duckhaus* was issued June 26, 2014, after the ALJ's decision of January 8, 2014, but before the Department's later overruling of that decision on July 3, 2014 (certified October 28, 2014). On appeal before this Board neither party cited *Duckhaus*.

condition that *all* grounds recited in support of *various conditions* must no longer exist before any one condition may be modified.

Sound public policy supports this parsing of the language in section 23803 and disfavors the broad language we used in the quoted *Duckhaus* passage that may suggest otherwise. To the extent this language may be read to require the Department to deny modification of *any* specific condition because of the existence of all other grounds, regardless of whether a reasonable nexus between those grounds to the specific condition in question can be shown, it is disapproved. This clarification avoids placing a straitjacket on the Department's discretion, reasonably exercised, and prevents erection of an insurmountable barrier to licensees who have legitimate and reasonable bases to modify specific conditions. As the California Supreme Court has warned, "Delegated power [to an administrative agency] must be accompanied by suitable safeguards to guide its use and to protect against its misuse." (*Blumenthal v. Bd. of Med. Examiners* (1962) 57 Cal.2d 228, 236 [18 Cal.Rptr. 501].) We believe the requirement of "reasonableness" in sections 23800 and 23803, as interpreted here, serves as a "suitable safeguard" in cases such as this. To the extent *Duckhaus* may be read to allow the Department to deny a petition to modify a condition on a license without the need to establish a nexus between the remaining grounds and the specific condition sought to be modified, it is disapproved as contrary to our intent.

ORDER

The decision of the Department is reversed.[8]

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

---

[8]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 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.