

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

AB-9459

File: 21-540621 Reg: 14080430
FELIX JENKINS, Appellant/Protestant

v.

CIRCLE K STORES, INC.,
dba Circle K #3614
410 North Mercey Springs Road, Los Banos, CA 93535,
Respondent/Applicant

and

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 20, 2015

Pastor Felix Jenkins, acting on behalf of the New Canaan Mission Baptist Church¹ (appellant/protestant), appeals from a decision of the Department of Alcoholic Beverage Control² which granted the application of Circle K Stores, Inc., doing business as Circle K #3614 (respondent/applicant), for a premises-to-premises transfer of its off-sale general license.

Appearances include appellant/protestant Felix Jenkins, through his counsel,

¹Although the protest documents list only Jenkins' name, he testified that his protest is on behalf of the church as a whole. (See RT at p. 27.)

²The decision of the Department, dated July 30, 2014, is set forth in the appendix.

Ray D. Hacke of Omni Law Group, LLP; respondent/applicant Circle K Stores, Inc., through its counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson; and the Department of Alcoholic Beverage Control, through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

In December of 2013, respondent petitioned for a premises-to-premises transfer of its off-sale general license to its new location — not yet built— which is across the street from its previous location. The location of the new store (hereinafter, "New Location") is approximately 65 feet from the New Canaan Baptist Church (hereinafter, "Church"). On or about January 30, 2014, appellant filed a protest on behalf of the Church against the transfer. (Exhibit 1.)

At the administrative hearing held on July 8, 2014, appellant appeared in propria persona, documentary evidence was received, and testimony was presented by Josephine Te, a licensing representative for the Department; by Dan Dobson, respondent's Regional Operations Director; and by appellant on behalf of the Church.

Licensing Representative Te's testimony established that she was assigned to investigate the instant application for license transfer. (RT at p. 8.) During her investigation, Te determined that the New Location is properly zoned highway commercial (RT at p. 10), and has a conditional use permit from the City of Los Banos to operate as a store selling alcoholic beverages. There are no residences within 100 feet of the New Location, and there is no over-concentration of licenses in the area. (RT at pp. 11, 17, 25; Exhibit 2.) Also, the Los Banos Chief of Police has no objection

to the transfer of the license³ (see RT at pp. 16-17), and the license has been active without condition at respondent's previous location across the street since 1985 with no record of any disciplinary action. (Exhibit 2.) The instant protest was the only one filed against the transfer of the license.

Testimony from Dobson established that respondent has taken, or will take, a number of measures to ensure its operation at the New Location will not interfere with the Church. Those measures include: constructing an eight-foot-high concrete wall running along the entire property line between the New Location and the Church (RT at pp. 39-40); installing 16 to 18 security cameras inside and outside of the store at the New Location to monitor unlawful activity (RT at pp. 40-41); placing chimes on the doors of respondent's walk-in beer coolers to alert the store staff when someone enters them (RT at p. 41); exclusively storing distilled spirits behind the register and out of the reach of the general public (*ibid.*); and annual and monthly training of respondent's employees regarding checking for proof of majority from patrons who seek to purchase age-restricted products. (RT at p. 42.)

After the hearing, the Department issued its decision "not sustain[ing]" appellant's protest and granting the applied-for transfer request with five conditions: (1) no alcoholic beverages shall be consumed on any property adjacent to the licensed premises under respondent's control; (2) loitering is prohibited on or around both the licensed premises and the area under respondent's control; (3) respondent is responsible for maintaining free of litter the area adjacent to the licensed premises under its control; (4) respondent will not allow its patrons or the general public to loiter

³It is also worth noting, however, that neither the county sheriff's office nor the City of Los Banos keep crime statistics concerning the area. (RT at pp. 17, 25.)

or congregate on any sidewalk adjacent to the licensed premises; and (5) respondent shall post and maintain a professional quality sign facing its parking lots that warns against loitering, littering, and drinking of alcoholic beverages. (See Order; Exhibit 2.) Notably, respondent had already agreed to these conditions when it signed the petition for conditional license on March 13, 2014. (*Ibid.*)

Appellant filed an appeal making the following contentions: (1) respondent's chosen location for its new store is in an area that is an intrinsic draw for children and therefore its license-transfer request should have been denied; and (2) the Department abused its discretion in granting the premises-to-premises transfer. These issues will be discussed together.

DISCUSSION

Appellant contends that the Department's decision should be reversed because the New Location is so close to the Church, the Church is an "intrinsic draw for children," and public policy therefore weighs against having a store that sells alcoholic beverages within such close proximity to the Church. (App.Br. at p. 3; App.Cl.Br. at pp. 5-6.) Appellant maintains the Church is particularly concerned about the adverse secondary effects of the business that threaten the safety of the children — effects that include: violent crime, the increased likelihood that the Church's youth parishioners will be exposed to "age-restricted products" like alcoholic beverages, tobacco, and adult magazines, the presence of vagrants, loiterers and/or intoxicated persons who could negatively interact with young parishioners or disrupt other Church events, and blight such as graffiti or littering. (App.Br. at p. 2.) Accordingly, appellant argues, the Church is concerned for its youthful parishioners, and believes that respondent's efforts to minimize the impact that operating its store at the New Location will have on the Church

are inadequate. (*Id.* at pp. 3-4.)

Appellant ultimately claims "[h]ad ABC taken into greater consideration the moral welfare and safety of the Church's youth parishioners, it is reasonably probable that the Church would have gotten the favorable result it now seeks." (App.Br. at p. 8.) Appellant's argument is therefore premised on its contention that, for the aforementioned reasons, the Department abused its discretion in granting the license transfer.

Respondent first counters that the arguments appellant raises in his opening brief are waived because appellant did not specifically raise them in his initial protest or at the administrative hearing.⁴ Respondent claims appellant limited his initial protest to two issues: the Church's future — but as yet unrealized — plans for development, and the concern of the effects of gas fumes from the New Location on the Church's parishioners. By doing so, respondent claims, appellant also limited the issues to be decided at the administrative hearing. (Resp.Br. at pp. 9-10, citing Bus. & Prof. Code § 24015; Exhibit 1.) Moreover, respondent argues that Pastor Jenkins reconfirmed several times throughout the administrative hearing that the Church's principal concern with the license transfer stemmed from the effects it might have on the Church's plans for future growth. (See *id.* at pp. 10-11.) Lastly, respondent contends that appellant either outright failed to raise his concerns with the business's purported "secondary effects" on Church parishioners at the administrative hearing, or did not sufficiently raise them in order to preserve them for appeal. (*Id.* at pp. 11-15.)

⁴The Department did not raise any arguments of its own in this matter and opted instead to join "with arguments contained in Respondent-Applicant's Brief." (Dept.Br. at p. 2.)

Appellant responds by claiming these issues were raised at the administrative hearing via the various questions asked and comments made by Pastor Jenkins throughout the proceeding. (See App.Cl.Br. at pp. 3-5.) As such, appellant contends, the issues he raises now were properly preserved for appeal.

The parties' arguments on this point raise several fascinating and complicated issues that implicate the very fulcrum of the balance between judicial economy and litigants' due process rights. For instance, how strictly do the applicable provisions of Business and Professions Code section 24015 confine the issues to be decided at an administrative hearing on a protest matter?⁵ How is *any* litigant supposed to comprehend the applicable constraints where, as here, the "Notice of Hearing on Protest" — which is notably issued by the Department — defines the issues to be determined at the hearing extremely broadly?⁶ What exactly constitutes "raising an issue" at the administrative hearing? Finally, how are the answers to the first three

⁵Subdivision (d) of section 24015 of the Business and Professions Code provides:

If a request for a hearing is filed with the department pursuant to subdivision (b), the department shall schedule a hearing on the protest. The issues to be determined at the hearing shall be limited to those issues raised in the protest or protests of the person or persons requesting the hearing.

⁶The "Notice of Hearing on Protest," issued by the Department on May 22, 2014, states:

The issues to be determined at said hearing are whether granting of such license(s) would be contrary to public welfare and morals by reason of Article XX, Section 22 of the Constitution of the State of California, Section 23958 of the Business and Professions Code, the Alcoholic Beverage Control Act of the Department of Alcoholic Beverage Control.

(Exhibit 1.)

questions shaped by the fact that a litigant commences his protest and appears at the administrative hearing in propria persona?⁷

Fortunately, the Board need not resolve these issues here. Even assuming, *arguendo*, that each of the arguments appellant raises were properly preserved for appeal, we find them unpersuasive.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. (See Cal. Const., art XX, § 22; Bus. & Prof. Code §§ 23084 and 23085; and *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d. 85 [84 Cal.Rptr. 113].) In reviewing the Department's decision, the Board must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Bus. & Prof. Code § 23084.)

Appellant maintains that the Department abused its discretion in granting the instant license transfer because there are "legitimate reasons, supported by long-

⁷Respondent cites *Tehachapi Mountain Pub & Brewery, LLC* (2014) AB-9417 for the notion that the "Board should not extend appellant any special amount of latitude in this regard merely because appellant chose to appear in propria persona and may not have known how to preserve an issue for appeal." (Resp.Br. at pp 7-8, quoting *Tehachapi, supra*, at p. 8) Respondent's reliance on *Tehachapi* is misplaced because in that case, unlike here, the pro per litigant commenced the hearing by stating, on the record, that it had no issue with the charges in the accusation — thereby prompting the Department to waive putting on its case concerning culpability — only to challenge certain of those charges on appeal. That situation is markedly different from an instance where, as here, the pro per litigant protests an application for transfer of a license at every conceivable stage of consideration.

standing public policy, to deny liquor licenses to businesses that set up shop as close as [the New Location] is to the Church." (See App.Br. at p. 5.) To support his argument, appellant cites *Schaub's, Inc. v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 858, 867 [315 P.2d 459], which stated that "regulations [of traffic in liquor] by way of exceptions in respect to churches and schools should be liberally construed in favor of such regulations and against applicants for license to sell liquor within prescribed areas."

Appellant's reliance on *Schaub's* is unpersuasive because, in so relying, appellant ignores the true issue at the heart of that matter. As stated by the Court,

[T]he question for determination is whether, *under the facts of this case*, . . . the department acted arbitrarily and abused the discretion vested in it by deciding *under these facts*, that the location of the license applied for was against public welfare and morals because of the fact that a protesting church was located directly across the street from the premises sought to be licensed?

(*Schaub's, supra*, at pp. 865-866, emphasis added.) The *Schaub's* court's inquiry and analysis were expressly confined to the facts of that case. The Court did not attempt to establish a "bright-line rule" or define a proximity standard for the precise distance between a store selling alcoholic beverages and a church when the Department considers a license application. Indeed, the Court found just the opposite, acknowledging the Department's "more or less plenary powers" in determining whether to grant such an application:

"The people in their wisdom have given appellant board the exclusive power to determine under what circumstances it is or is not contrary to public welfare and morals to issue a liquor license. Such a determination is frequently a difficult one and not subject to hard and fast rules. The presence of churches in the vicinity of the premises in question is not in itself necessarily determinative. Different conclusions may properly be reached at different times or under different circumstances. The board is wisely left free to act upon each application for a license as it comes

before it."

(*Id.* at p. 866, quoting at length *Altadena Community Church v. State Bd. of Equalization* (1952) 109 Cal.App.2d 99, 106 [240 P.2d 322].)

Although the *Schaub's* court ultimately held that the Department had acted within its discretion in denying the applied-for license (see *id.* at p. 869), subsequent cases have since confirmed that the "'mere proximity' of the proposed premises to a . . . church is not, as a matter of law, the 'good cause' which will constitutionally sustain denial of a license." (*Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 255 Cal.App.2d 40, 45 [62 Cal.Rptr. 778]; see also *Martin v. Alcoholic Bev. Control Appeals Bd.* (1961) 55 Cal.2d 867, 875 [13 Cal.Rptr. 513] [holding that the Legislature's enactment of Business and Professions Code section 23789 did not determine that the proximity of a licensed premises to the church was in and of itself good cause for refusal of a license, and, in every case, the Department is "bound to exercise a legal discretion in passing on [a license] application."].)

The other cases appellant cites to support his claim that the Department violated a long-standing public policy are similarly unavailing because they have no applicability to the instant matter. *Madain v. City of Stanton* (2010) 185 Cal.App.4th 1277 [111 Cal.Rptr.3d 447] and *City of National City v. Wiener* (1992) 3 Cal.4th 832 [12 Cal.Rptr.2d 701] concerned attempts to establish an adult cabaret and an adult bookstore and arcade, respectively, that were challenged as contrary to applicable city ordinances. No claimed violation of city ordinances are at issue here. *People v. Marzet* (1997) 57 Cal.App.4th 329 [67 Cal.Rptr.2d 83] and *People v. Williams* (1992) 10 Cal.App.4th 1389 [13 Cal.Rptr.2d 379] are not helpful to appellant as they concerned

the illegal sale and trafficking of narcotics, and appellant has cited no authority or evidence to support his contention that "the Church's youth parishioners are every bit as vulnerable to the evils attendant with age-restricted products as they would be to the evils of illegal narcotics." (App.Br. at p. 6.) None of the cases cited by appellant considered alcoholic beverage licenses, and none involved a state agency — here, the Department — that is constitutionally and statutorily vested with authority and discretion to regulate licenses on behalf of the public welfare and morals. Hence, any policy considerations at issue in *Madain*, *Wiener*, *Marzet*, and *Williams* are inapplicable here, and appellant's attempt to extend their reasoning to alcoholic beverages — or *all* age-restricted products for that matter — is rejected.

The remainder of appellant's position, although not quite stated as such, is that the findings in the Department's decision are not supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

As mentioned, when an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by those findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, supra*, at p. 94.) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's

decision and accept all reasonable inferences in support of the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

While it is debatable whether appellant adequately raised his issues at the administrative hearing, appellant now claims evidence in the record is insufficient to alleviate the Church's concerns that transferring the license to the New Location would result in increases in: violent crime; exposure of the Church's youth parishioners to age-restricted products; exposure of all of the Church's parishioners to intoxicated persons, loiterers, and vagrants; and graffiti and littering.

With regard to crime, Licensing Representative Te testified that there was no over-concentration of licenses in the area. (RT at p. 11.) She also noted that neither the county sheriff nor the City of Los Banos keep crime statistics concerning the area (RT at pp. 17, 25), but the Los Banos Chief of Police had no objection to the transfer of the license. (RT at pp. 16-17.) The ALJ found the latter fact to be important:

It is significant that the chief of the local police department had no objection to the transfer of Applicant's license to its future store. This fact is some evidence of the police department's opinion that sale of alcoholic beverages at the store will not create law enforcement problems. The Department is entitled to give great weight to the opinion of the police department, which has expertise on such matters.

(Determination of Issues II.)

Moreover, respondent's Regional Operations Director testified that, not only does

respondent *not* expect crime to increase at the New Location, but it has also *not* experienced any change in the amount of crime at its other location in Los Banos — unrelated to the locations at issue here — where similar changes have been implemented:

[PASTOR JENKINS:]

Q. So is it safe for us as a church to be concerned for the fact that I've heard the statement that the crime or issues with the current — where your previous location, would it be wrong for us to think that it would increase because you're actually going to increase your sales and make it more readily available and have more for your customers to come in and get.

[MR. DOBSON:]

A. You're asking me to speculate.

Q. I'm asking, is there a possibility that that's going to change from where you were. You pride yourself saying you guys didn't have much crime in that location where you were. But now that you're moving to a newer store, increasing your — and hoping to increase your sales, I'm sure that's the reason why you're increasing the size of the store.

Are you actually hoping that that's going to take place as far as selling more alcohol?

MR. SALTSMAN: Judge, I heard like three or four questions in that. Perhaps what the pastor is asking is, A, does Circle K hope to have better sales than at the other location. And B, will that present a problem?

JUDGE LO: First of all, I know the answer to A is yes.

THE WITNESS: Yes.

JUDGE LO: What about the second? First of all, why would you have more customers to sell more just by going across the street?

THE WITNESS: It's going to be an enhanced offering. Obviously a larger store. There's more accessibility, more parking, a greater food offering inside the store, and generally the capacity to handle more customers.

MR. SALTSMAN: You're talking about the sales overall including

food and other products?

THE WITNESS: Of course, absolutely. And to answer part B, if I may, no, we do not expect an increase in crime for moving across the street.

MR. JENKINS: Q. [*sic*] And then with the — now, with the increase — with the beer cave that you say is going to be placed in the new location in the new store —

A. Yes.

Q. — do you have one of those currently at any other stores and has it changed in that location?

A. Changed the —

Q. As far as more crime, more people running in and doing beer runs.

A. No, it has not increased. And yes, we do have — we have actually added a beer cave to another store in Los Banos.

Q. And did you have any — did it change anything because I'm sure you put the beepers and buzzers, did it decrease anything or stay about the same prior to you putting a beer cave in?

MR. SALTSMAN: I'm going to state an objection. What does it mean, the sales, issues?

MR. JENKINS: Q. [*sic*] The sales, or the crime, running in and doing beer runs, does it change any of that when you upgraded to beer cave and made it more — as far as the security of that, did it affect anything?

A. There hasn't been a significant change in crime at the location where we added the beer cave.

Q. But was there a change?

A. No.

Q. No increase at all?

A. No.

Q. And how about decrease?

A. I mean, I don't have the specific statistics.

MR. SALTSMAN: That's assuming facts not in evidence, your Honor. And we're getting into guessing at this point.

JUDGE LO: If you don't know, you can just say you don't know. I'd prefer you don't guess.

THE WITNESS: I don't know.

(RT at pp. 48-51.) Altogether, there is substantial evidence in the record to support the Department's determination that appellant's mere concern with crime is not in itself sufficient to warrant denial of the application to transfer the license to the New Location.

Similarly, the Church's concern over the potential increased exposure its youth parishioners will have to age-restricted products is unpersuasive. Respondent has operated at its previous location, which was just across the street from the Church, for approximately 30 years without any discipline from the Department for selling alcoholic beverages to minors. (RT at pp. 36-37; Exhibit 2.) Moreover, respondent is taking extensive measures to ensure that alcoholic beverages will not reach the hands of minors, regardless of whether they are parishioners of the Church, including: placing chimes on the doors of respondent's walk-in beer coolers to alert the store staff when someone enters them (RT at p. 41); exclusively storing distilled spirits behind the register and out of the reach of the general public (*id.*); and annual and monthly training of respondent's employees regarding checking for proof of majority from patrons who seek to purchase age-restricted products. (RT at p. 42.) Appellant has provided nothing but a bald assertion to support his contention that such measures will be insufficient to dispel the Church's concerns over its youth parishioners, but "[w]ith no developed argument in support of his assertion, appellant cannot hope to persuade the Board to consider his assertion, much less to agree with it." (*Neubauer* (2012))

AB-9160, at p. 5.)

Appellant's concerns over intoxicated persons, loiterers, and vagrants interfering with Church functions are understandable but unpersuasive as reasons for denying the license transfer. Respondent has voluntarily agreed to several conditions on its license, measures which were recommended by both the Department and the City of Los Banos during the conditional use permitting process to ensure that its operation at the New Location will not interfere with the Church. (See RT at p. 38; Exhibit 2) Those conditions include: no alcoholic beverages shall be consumed on any property adjacent to the licensed premises under respondent's control; loitering is prohibited on or around both the licensed premises and the area under respondent's control; respondent will not allow its patrons or the general public to loiter or congregate on any sidewalk adjacent to the licensed premises; and respondent shall post and maintain a professional quality sign facing its parking lots that warns against loitering, littering, and drinking of alcoholic beverages. (Exhibit 2.) Aside from the conditions, respondent has also agreed to construct an eight-foot-high concrete wall around the perimeter which, presumably, would further reduce the potential that its customers would negatively interact with Church parishioners.

Finally, the wall respondent plans to construct, the 16 to 18 cameras it intends to install inside and outside of the licensed premises at the New Location, and the condition on respondent's license that it is responsible for maintaining free of litter the area adjacent to the licensed premises under its control support the Department's decision that appellant's concerns about "blight" do not merit denial of the application.

There is ample evidence in the record to support the Department's decision to grant the license transfer. Appellant's mere contention that future problems *may* occur

if the license is transferred to a location closer to the Church, without any admissible evidence to support it,⁸ is simply not enough to conclude that the Department's decision constitutes an abuse of discretion. Appellant is simply asking this Board to reweigh the evidence by considering the same set of facts and reaching the opposite conclusion as the Department. This the Board cannot do.

ORDER

The decision of the Department is affirmed.⁹

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

⁸We see from the reporter's transcript that Pastor Jenkins attempted to admit into evidence various news articles concerning crimes that have occurred in the past, but the ALJ refused to admit them over relevance objections. (See RT at pp. 59-64.) Counsel for appellant has not argued on appeal that the articles were improperly excluded, and hence we cannot and do not consider them here.

⁹This final decision 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.