

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

AB-9473

File: 21-534450 Reg: 14080556
ADEL MAKAR, Appellant/Protestant

v.

W & G PETROLEUM, INC.,
dba OC Liquor & Mini Mart
14520 Magnolia Street, Unit A
Westminster, CA 92683-1305,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 5, 2015
Los Angeles, CA

ISSUED MARCH 24, 2015

Adel Makar (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ granting the application of W & G Petroleum, Inc., doing business as OC Liquor & Mini Mart (respondent/applicant), for an off-sale general license.

Appearances include appellant/protestant Adel Makar, through his counsel, Stephen J. Chonoles; respondent/applicant W & G Petroleum, Inc., through its counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, through its counsel,

¹The decision of the Department, dated September 3, 2014, is set forth in the appendix.

Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

The proposed premises have been continuously licensed with either a type 20 or a type 21 license since June of 1992 with no history of disciplinary action. On April 7, 2009, the license was upgraded from a type 20 to a type 21. The previous license-holders closed their business on April 2, 2013, and on June 6, 2013, the existing license was cancelled following a premises-to-premises transfer. On June 24, 2013, applicant petitioned the Department for the issuance of an off-sale general license. Applicant has been operating at the subject premises since April 23, 2014 under an interim permit. Appellant filed a protest, and an administrative hearing was held on July 10, 2014.

At that hearing, oral and documentary evidence was presented by Kim Hong, a licensing representative with the Department of Alcoholic Beverage Control; by Habib Alam, president of the applicant corporation, W & G Petroleum, Inc., and by protestant Adel Makar, the holder of five ABC licenses, three of which are in the City of Westminster, including one that is approximately 1.37 miles from the subject premises. (RT at pp. 74-75.)

Testimony established the premises were previously licensed and operated within 90 days of the application with the same type of license as the one for which application was made. Accordingly, neither rule 61.4 — concerning residences within 100 feet (Cal. Code Regs, tit. 4 § 61.4) — nor section 23958.4 of the Business and Professions Code — regarding high crime and over-concentration of licenses — apply. Also, the closest residence and school are located approximately 130 feet and 1,500 feet from the premises, respectively. (RT at pp. 24, 78.) There are, however, four

churches and a park within 600 feet of the premises. (RT at pp. 21-23.) Licensing representative Hong had contact with all five of these consideration points, and none of them raised an objection to the issuance of an alcoholic beverage license to applicant. (RT at pp. 23-24.) Also, the Westminster Police Department has no concerns regarding the issuance of the license. (RT at pp. 30, 35, 45-46.) In fact, the instant protest was the only one filed against the issuance of this license. (RT at p. 30.) Because of the extensive, discipline-free history of licensure at the subject premises, the Department recommended approval of the license with no conditions.

After the hearing, the Department issued its decision denying appellant's protest and allowing the license to issue with no conditions.

Appellant filed an appeal based on the following contentions: (1) the Department's decision and findings are not supported by substantial evidence; and (2) the Department used an incorrect standard in approving the license. These issues will be discussed together.

DISCUSSION

Appellant argues that the decision is not supported by substantial evidence in light of the whole record. Specifically, appellant argues the Department "never made a determination as to whether the issuance of the requested license would be detrimental to the welfare of the public as a whole," and the standard applied by the Department was too narrow. (App.Br. at p. 3.)

When an appellant contends that a Department decision is not supported by substantial evidence, the Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is

supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) "Substantial evidence" is relevant evidence which reasonable minds would accept as 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].)

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

In a protest matter, "the applicant bears the burden of proof regarding the applicant's eligibility for a liquor license from the start of the application process until the Department makes a final determination." (*Coffin v. Alcoholic Bev. Control Appeals Bd.*

(2006) 139 Cal.App.4th 471, 473 [43 Cal.Rptr.3d 420].)

The administrative law judge (ALJ) considered the following objections at the hearing below:

(1) the premises are located in a residential area and the operation of the premises, if licensed, would interfere with the quiet enjoyment of the residential property by the nearby residents, (2) issuance of the license would tend to create a law enforcement problem in the area, (3) issuance of the license would result in or add to an undue concentration of licenses in the area, (4) there are one or more schools or parks located in close proximity to the premises and (5) there are one or more churches located in close proximity to the premises.

(Findings of Fact II.) At the onset of the hearing, the ALJ stated on the record that these were to be the sole issues considered in this case, and all parties, including appellant, indicated that the list was satisfactory. (RT at pp. 7-10.)

The exhaustive list of issues being established, the ALJ reached the following conclusions:

III

A. As indicated above, no residences are located within 100 feet from the premises or its parking lot. The closest residence is located approximately 130 feet to the rear of the premises. The Department's licensing representative, Kim Hong, spoke to the person who resides at this nearby residence and this resident expressed no concerns regarding the applied-for license. Furthermore, the protestant did not provide any evidence as to how operation of the premises would interfere with the quiet enjoyment of nearby residents.

B. The preponderance of the evidence established that the issuance of the applied-for license will not interfere with the quiet enjoyment of the residential property by the nearby residents. Factors taken into consideration also include the fact that the premises have been licensed continuously since June of 1992 with no history of disciplinary action and the fact that the local law enforcement agency had no objections or concerns regarding the issuance of the applied-for license.

IV

A. The preponderance of the evidence established that the issuance of

the applied-for license will not create a law enforcement problem in the area where the premises are located. The Westminster Police Department is the local law enforcement agency for the area where the premises are located and it did not file a protest in this matter. Kim Hong, a licensing representative for the Department, was assigned to investigate the application filed in this matter. Ms. Hong spoke to Lieutenant Ben Jaipream of the Westminster Police Department regarding the applied-for license and he expressed no concerns or objections regarding the applied-for license. Furthermore, the premises have been continuously licensed with either a type 20 or a type 21 license since June of 1992 with no history of disciplinary action.

B. The Westminster Police Department provided the latest crime statistics to the Department. The premises are located in reporting district 27 and the crime statistics for this reporting district indicate that the premises are located in a high crime area.

C. The premises are located in Census Tract 889.05. The Census Tract where the premises are located allows for three off-sale licenses by population and only two off-sale licenses currently exist in the Census Tract. Therefore, over concentration of licenses in the Census Tract where the premises are located does not exist [*sic*] by virtue of the number of licenses allowed in the Census Tract. However, the evidence established that undue concentration of licenses exists in the area where the premises are located because the premises are located in a high crime reporting district. Nevertheless, public convenience or necessity does not apply in the instant matter because the preponderance of the evidence established that the premises was licensed and operated with the same type of license within 90 days of the application date. The prior licensees at the subject premises closed Tri Liquor on April 2, 2013 and that license was cancelled and transferred premises to premises on June 6, 2013. The Applicant filed its application for a license with the Department on June 24, 2013.

V

The preponderance of the evidence established that the issuance of the applied-for license will not interfere with any nearby schools or parks. No schools are located within 600 feet of the premises. The closest school to the premises is located 1500 feet from the premises. Westminster Park is located approximately 85 feet north of the premises. This park is separated from the premises by Hazard Avenue which [*sic*] a four lane street. Ms. Hong contacted the person in charge of the park and that person expressed no objections or concerns regarding the applied-for license.

VI

A. The preponderance of the evidence established that the issuance of the applied-for license will not interfere with any nearby churches. Four churches are located within six hundred feet of the premises.

[¶ . . . ¶]

F. No protests were filed by any of these churches, the persons in charge of the churches did not express any objections or concerns when contacted by Ms. Kim [*sic*] and the evidence established that the operation of the premises if licensed would not interfere with any of these churches.

(Findings of Fact III-VI.)

Appellant claims the premises are in a high traffic area, and neither applicant nor the Department produced any data from the Westminster Police Department, the Orange County Sheriff's Department, or the California Department of Motor Vehicles concerning the number of vehicle accidents in the area, the number of DUI tickets issued in the area, or the number of arrests made in the area for public intoxication. (Id. at p. 7.) Appellant is correct that no data concerning the traffic problem he references was produced on the record. That said, appellant's argument suffers from one fatal flaw: he outright failed to raise his concerns regarding traffic — or his objection to the "much narrower" issuance standard applied by the Department, for that matter — at the administrative hearing.

Review of appellant's closing argument establishes that his issues were principally with the proximity of the premises to residences, schools, parks, and churches, and the fact that the license was issued without conditions. (See RT at pp. 82-83.) Moreover, as discussed above, appellant raised no objection to the ALJ's list of proposed issues, which included neither traffic concerns nor concern with the issuance standard applied by the Department and was clearly intended to be exhaustive. The

ALJ expressly considered each of these issues and apparently did not find appellant's protest convincing. The Board will therefore not consider any peripheral issues appellant wishes to raise here for the first time on appeal.

On a final note, as discussed at oral argument, Licensing Representative Hong's investigation in this case was one of the more thorough and comprehensive licensing investigations conducted by the Department in recent years. Not only did she personally contact Detective Jaipream and representatives from each of the five consideration points to confirm there were no concerns with the issuance of the license, but, although she was not required to do so, Hong also sought the opinions of nearby residents, business owners and patrons of the licensed premises — none of whom expressed any concern or raised any protest. Thus, there was ample evidence in the record for the ALJ to have determined that issuance of the instant license was warranted.

Appellant's mere disagreement with the conclusions reached by the ALJ constitutes neither error nor abuse of discretion. The ALJ found that the applicant made its case — that the issuance of the license would *not* be contrary to public welfare and morals — and, having failed to rebut that case at the administrative hearing, appellant would have this Board reweigh the evidence, consider assertions which were not made or argued at the administrative hearing, and reach a different conclusion. This is something the Board cannot do. We find no reason to upset the Department's decision.

ORDER

The decision of the Department is affirmed.²

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

²This 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.