

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

AB-9484

File: 21-536929 Reg: 14080867

3110 ROOSEVELT STREET INVESTMENTS, INC.,
dba Circle K
3110 Roosevelt Street, Carlsbad, CA 92008-3017,
Appellant

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

and

JAMES GREENE and JOHN WALTERS,
Protestants/Respondents

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 6, 2015
Los Angeles, CA

ISSUED AUGUST 18, 2015

Appearances: Saad Attisha, appearing in propria persona, on behalf of appellant 3110 Roosevelt Street Investments, Inc. Kerry K. Winters, for respondent Department of Alcoholic Beverage Control. James Greene and John Walters, protestants, appearing in propria persona.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control¹ that denied appellant's application for a type 21 off-sale general license.

¹The decision of the Department, dated December 5, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's current type 20 off-sale beer and wine license was issued on June 13, 2013. Appellant was selected in a priority drawing for a type 21 off-sale general license. On December 23, 2013, appellant applied for issuance of the off-sale general license, to replace its current license. Accordingly, the Department conducted an investigation, and on July 29, 2014, denied the application, citing Business and Professions Code sections 23958, 23958.4, and 23789, as well as rule 61.4.²

Appellant challenged the denial, and an administrative hearing took place on November 4, 2014. Documentary evidence was received and testimony was presented by Department Licensing Representative Irene Sonoda; by Jeff Myers, Director of Operations of the Boys & Girls Club of Carlsbad; by Detective Mike Larson of the Carlsbad Police Department; and by protestant James Greene. Appellant presented no witnesses.

The Carlsbad Police Department (CPD) has jurisdiction over the licensed premises. According to statistical information maintained by the CPD, the crime rate within the census tract is 111% of the citywide average. Per Business and Professions Code section 23958.4(a)(1), anything above 120% of the average is considered "high crime."

The CPD, however, opposed issuance of the license, noting that the premises are located in a known gang area. Between March and October of 2014, there were 31 calls associated with the licensed premises' address. The calls concerned numerous problems, including robbery, shots fired, fights and thefts, to drunks and "unwanted

²All references to rule 61.4 are to Cal. Code Regs., tit. 4, § 61.4.

persons” (i.e. individuals refusing to leave). The CPD has limited resources to deal with the existing crime and alcohol-related problems in this area, and believes that issuance of the applied-for license will further strain police resources.

Pursuant to Business and Professions Code section 23958.4(a)(3), four off-sale licenses are permitted in the relevant census tract. There are currently fourteen businesses — including appellant’s — holding Department-issued off-sale licenses within this census tract. The applied-for license would therefore not affect the number of licenses within the census tract.

There are seven residences within 100 feet of the licensed premises. One of these residents, James Greene — whose residence is located across an alley to the rear of the licensed premises — protested issuance of the license. Additionally, John Walters, a nearby resident, also protested issuance. Both protestants are concerned that issuance of the applied-for license will aggravate an existing law enforcement problem in the area. They have dealt with vandalism, public intoxication, vagrants, and public urination caused by customers of the licensed premises. Greene lives across the alley from the premises. His tenants complain to him about individuals who loiter near the rear of the premises and confront them on a regular basis. Both protestants believe issuance of an off-sale general license will aggravate these problems.

The Boys & Girls Club of Carlsbad is located 165 feet across the street from the licensed premises. Jeff Myers, Director of Operations for the Boys & Girls Club, opposed issuance of the license. He expressed concern for the safety of the children coming and going to and from the club. He noted that homeless individuals often congregate in the area and consume alcoholic beverages. According to Myers, adding distilled spirits to the mix is only asking for trouble for the children of the community.

Myers is personally aware of one instance in which two 18-year-olds left the club and were found a short time later consuming beer near the club. While there is no evidence to substantiate it, the implication is that the beer was purchased at appellant's store.

In his decision, the ALJ identified three questions relevant to the application: whether operation of appellant's business with the license sought would cause or aggravate an existing law enforcement problem; whether issuance of the applied-for license would result in or add to an undue concentration of licenses; and whether issuance of the applied-for license would interfere with the residential quiet enjoyment of nearby residents.

The ALJ first concluded that issuance of the applied-for license would result in cancellation of appellant's previous license, and would therefore not add to the undue concentration of licenses in the census tract. Appellant was therefore not required to establish public convenience and necessity.

However, the ALJ held that although the area is not statistically "high crime," issuance of the license will aggravate an existing law enforcement problem, as indicated by the evidence presented by Mike Larson of the CPD and protestant Greene. Cause for denial was therefore held to exist under Business and Professions Code section 23958.

The ALJ held further held that the evidence supported the conclusion that issuance of the license would aggravate existing problems and interfere with the safe operation of the Boys & Girls Club of Carlsbad. Business and Professions Code section 23789(b) authorizes the Department to refuse issuance of any retail license for premises located within 600 feet of schools, public playgrounds, and nonprofit youth facilities; denial of the application was therefore proper.

Finally, the ALJ concluded, based on the facts and circumstances surrounding the application and protest, that issuance of the applied-for license would interfere with the quiet enjoyment of nearby residents, and that appellant had not established otherwise as required by rule 61.4.

In light of these conclusions, appellant's application for a type 21 off-sale general license was denied.

DISCUSSION

Appellant interprets the Department decision to mean that appellant "would be considered a bad neighbor in Carlsbad," and urges this Board to "reconsider, and realize that nothing could be further from the truth." (App.Br. at p. 1.) Appellant argues that issuance of the license will, in fact, improve the neighborhood, and will serve community convenience and necessity. (*Ibid.*)

When an appellant contends the 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].)

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].)

Appellant first objects to the ALJ's conclusions regarding the affect of the applied-for license on the Boys & Girls Club located across the street from the licensed premises. That issue was decided pursuant to Business and Profession Code section 23789(b), which provides:

The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within at least 600 feet of school and public playgrounds or nonprofit youth facilities, including, but not limited to, facilities serving Girl Scouts, Boy Scouts, or Campfire Girls.

The court of appeal has held that because there is "no question" that traffic in liquor "is subject to regulation by the state in the exercise of its police powers," it follows that exceptions to these regulations "in respect to churches and schools should be liberally construed in favor of such regulations and against applicants." (*Schaub's, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 858, 867 [315 P.2d 459].)

However, the Department must still show good cause for denial of the license:

If *mere proximity* were as a matter of law "good cause" for denial of a license the department would not be specifically *authorized* to refuse the issuance; by contrast, it would be specifically *required* to refuse it. Therefore . . . in every such case the department is bound to exercise a legal discretion in passing on the application.

(*Martin v. Alcoholic Bev. Control Appeals Bd.* (1961) 55 Cal.2d 867, 875 [13 Cal.Rptr. 513], emphasis in original.)

The ALJ made the following relevant findings of fact:

5. The Boys & Girls Club of Carlsbad is located at 3115 Roosevelt Street, across the street from the premises. The separation is 165 feet, well within the 600 foot distance dictated by statute. The Boys and Girls Club of Carlsbad is a consideration point as per Business & Professions Code 23789. Jeff Myers is the Director of Operations for the Boys & Girls Club. He is opposed to the issuance of this license. He is concerned about the safety of the children coming and going to and from the club. Individuals who are homeless and often consuming alcoholic beverages congregate in the area. Adding distilled spirits to the mix, according to Mr. Myers, is only asking for trouble for the children of the community. Mr. Myers is personally aware of one instance when two 18 year olds left the club and were found a short time later consuming beer near the club. Although there is no evidence to substantiate it, the insinuation is that the beer was purchased at Petitioner's store.

(Findings of Fact ¶ 5.) Based on these findings, the ALJ reached the following conclusion of law:

8. Business & Professions Code Section 23789(b) authorizes the Department to refuse the issuance of any retail license for premises located within at least 600 feet of schools and public playgrounds or nonprofit youth facilities. The Boys and Girls Club of Carlsbad is 165 feet from the premises. The Club's director is opposed to the issuance of the license. It is believed that issuance of the license would further aggravate problems that are currently existing and interfere with the safe operation of the Boys & Girls Club of Carlsbad. (Findings of Fact, ¶ 5.) The evidence supports that conclusion.

(Conclusions of Law ¶ 8.)

Appellant argues that the problems referred to in the decision are, in fact, problems of the whole community, and not of appellant's premises in particular:

We are as concerned about the use of alcohol by minors as any other good citizen of the community. . . . We therefore respectfully disagree with [the ALJ's] conclusion that 'evidence supports' the idea that a type 21 permit would make the local situation worse. The concerns of the Boys and Girls Club director, Mr. Jeff Myers, are understandably a concern of the club's director and the community. The reasons, however, are more

generally related to the character of the neighborhood, something our type 21 license would actually improve. For instance, Mr. Myers is concerned about the homeless population near his facility and their behavior (Transcript 71-73). This is again a fair concern, but not one that can be directly attributed to our business. As Ms. Sonoda from the ABC testified, there are 14 type 20 and 21 holders within the area (Transcript 38). The source of any alleged alcohol consumed by the adults that concern Mr. Myers is unknown. Perhaps if the type of the alleged alcohol was known, there might be more to be done, but we simply do not know. Furthermore, Mr. Myers suggested that 'they [the homeless] were drunk or intoxicated or high on some sort of drug or something to that effect' (Transcript 73). Clearly there is an issue with substance use in the community, but it is not something that this store contributes to directly.

(App.Br. at p. 1.)

Significantly, appellant entirely ignores the fact that his premises, unlike other premises in the city, are located only 165 feet from the Boys & Girls Club — across the street, in fact — and are therefore subject to the discretion granted the Department by section 23789. A source of distilled liquors located *across the street* from a nonprofit youth facility presents, we may infer, more of a risk to the youth that frequent the facility than similar premises located blocks away. This inference was supported by Myers' testimony, which indicates — albeit anecdotally — that minors at the facility may be tempted to acquire distilled liquors from the premises. (RT at pp. 76-77.) Moreover, Myers described intoxicated adults — homeless and otherwise — congregating in the area and heckling the children. (RT at pp. 72-75.) The Department has therefore established good cause sufficient to exercise the discretion granted by section 23789.

Appellant, on the other hand, offers nothing but the unsupported reassurance that issuance of the applied-for license will somehow *improve* the character of the community. In the absence of evidence supporting that belief, we are skeptical.

Appellant next challenges the conclusion that issuance of the license will aggravate an existing law enforcement problem. Pursuant to Business and Professions

Code section 23958:

Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall not deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

The department further shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses.

The ALJ made the following relevant findings of fact:

2. The Carlsbad Police Department [CPD] has law enforcement jurisdiction over the area where the Premises is located. According to statistical information maintained by the Carlsbad Police Department the census tract / reporting district where the premises is located had a total of 573 Part I crimes and Part II arrests. The city wide average for Part I crimes and Part II arrests per census tract is 516. The census tract where the premises is located is 111% of the average. Anything over 120% of the average is considered to be "high crime" as per Business & Professions Code Section 23958.4(a)(1). This census tract / reporting district is not considered to be "high crime" by statute.

3. In accordance with the count formula contained in Section 23958.4(a)(3), four (4) off-sale licensed businesses are permitted in the census tract where the Premises is located. There currently exist fourteen (14) businesses holding Department-issued off-sale licenses in this census tract. One of the fourteen off-sale licenses is the Type 20 license that Petitioner currently holds. If the Type 21 license is issued Petitioner will cancel the Type 20 license and the number of off-sale licenses will remain at fourteen.

¶ . . . ¶

7. The Carlsbad Police Department is opposed to the issuance of this license. The premises is located in a known gang area. Between March and October 2014, there have been 31 calls associated with this address, 3100 Roosevelt Street. Those calls have ranged from robbery, shots fired, fights and thefts to drunks and unwanted persons (refusing to leave). The Police Department has limited resources to deal with the existing crime and alcohol related problems in this area. Issuance of this

license will only create an additional drain on the very limited police resources.

(Findings of Fact ¶¶ 2-3, 7.) Based on these findings, the ALJ concluded that the concentration of licenses would be unaffected and that the premises were not located in a statistically high-crime area (Conclusions of Law ¶¶ 5-7.) While neither of these factors mandated denial, the ALJ concluded that issuance of the applied-for license would nevertheless present a problem for law enforcement:

9. Issuance of the license will tend to aggravate an existing law enforcement problem in the area. The concerns of local law enforcement officials carry a great deal of weight when it comes to determining what to do with these types of issues. The evidence presented by the Detective Mike Larson, which was supported by the testimony and evidence presented by protestant Greene clearly establishes that issuance of the license would aggravate an existing law enforcement problem. Cause for denial of petitioner / appellant's petition does exist under Article XX, Section 22 of the California State Constitution and Business and Professions Code Section 23958.

(Conclusions of Law ¶ 9.)

Appellant largely concedes there is a law enforcement problem in the area, stating, "Community policing is a difficult business, and our neighborhood is admittedly perhaps more difficult than others," but contests "the assumption that the change in status from a type 20 business to a type 21 business would make [Detective Larson's] job more difficult." (App.Br. at p. 2.) Appellant acknowledges he is "acutely aware of" gang activity in the area, but asserts that "denial of this permit change is not going to impact that fact. It will merely force our local residents to trek farther through the area to retrieve the items they are legally entitled to enjoy." (*Ibid.*) He admits that the thirty-one calls described by Detective Larson were made to the premises specific address and not merely the general area, but responds that "some of these calls are questionable. . . . It is possible that someone called from our location, but such is the

burden of a public institution." (*Ibid.*) Appellant concedes many of these calls were "beer runs" — i.e., the theft of beer from the store — and further admits that "liquor, with its compact size, could increase these types of crimes." (*Ibid.*) Appellant responds, however, that "Our business is staying in business, and the loss of inventory is detrimental to that goal. . . . We are . . . very aware of this problem and are well prepared to protect inventory." (*Ibid.*) Appellant does not describe what measures, if any, make it "well prepared" to prevent the theft of alcohol, but does argue that "Protection of this product is literally our business." (*Ibid.*) Finally, appellant claims his "goal is not to be a liquor store," but rather to "serve a need for convenience in the community." (*Ibid.*)

The evidence establishes there have been numerous calls to police regarding the premises' specific address. The evidence is supported by testimony from Detective Larson and protestant Greene. Introducing the sale of distilled liquors, which offer a much greater capacity for intoxication — and which, as appellant admits, are more compact and susceptible to theft — reasonably can be found to exacerbate law enforcement problems. While appellant insists he has the expertise to prevent that from happening, recurring law enforcement calls to his premises suggest his expertise has thus far proven insufficient. Denial of the application was, for this reason, reasonable.

Finally, appellant objects to the testimony of protestant Greene, arguing that "[w]e are all in this community together" and that "far from making the situation worse, a type 21 [off-sale general] license would further cement the community's investment in the Circle K as a one stop shop for convenient shopping." (App.Br. at p. 3.)

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 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.

(Emphasis added.) The burden is, therefore, on appellant to show that operation of the premises with the applied-for license will not interfere with the quiet enjoyment of nearby residents.

The ALJ made the following relevant findings of fact:

4. There are seven residences within 100 feet of the premises. Rule 61.4 does apply. One of those residents, James Greene, did protest issuance of this license. A second protest was filed by nearby resident John Walters.

¶ . . . ¶

6. Protestants are concerned that the issuance of the applied for license will aggravate an already existing law enforcement problem in the area. They have had to deal with vandalism, public intoxication, vagrants, and urinating in public caused by individuals who are customers of the Circle K store. Protestant Greene lives across the alley from the premises. His tenants complain to him about individuals who loiter near the rear of the premises and confront them on a regular basis. Protestants believe that issuance of the license will only serve to aggravate these problems.

(Findings of Fact ¶ 6.) Based on these findings, the ALJ reached the following conclusions of law:

11. After a thorough review of the facts and circumstances of this petition/protest, the Court concludes that the issuance of the applied for

license would interfere with the quiet enjoyment of the nearby residents.

(Conclusions of Law ¶ 11.)

In response, appellant largely agrees with protestant Greene's assessment, but feels that the sale of distilled liquors on its premises would, in fact, *improve* the community:

As Mr. Green himself noted "the present owners have made the effort to clean up the back of the buildings. They've done some things to make an effort to improve some of that. But it doesn't begin to scratch the surface of what the problems really are" (Testimony 101). Mr. Greene's assessment hits the nail on the head. We are all in this community together. Far from making this situation worse, a type 21 license would further cement the community's investment in the Circle K as a one stop shop for convenient shopping.

Mr. Greene has seen a great deal of vandalism in the community (Testimony 102-103.) We are as invested in the community as Mr. Greene and decry all his troubles. Without doubt, we have suffered from the bad elements of our community as well. We are doing what we can to become a pillar. Mr. Greene notes that "there is an element of very sensible fear" living in the area (Testimony 104). This situation isn't good for anyone. If the Circle K is more than the place where people get milk, and it becomes more the place where we shop at the end of the day for corn, diapers, wipes, and a bottle of gin with lime for an evening cocktail, we feel the community would be more invested in their local, walkable, community.

(App.Br. at p. 3.)

Appellant believes, it seems, that the sale of distilled liquor will upgrade the premises from a mere convenience store to an artisan market, and that the community — notably, not appellant — will respond by cleaning up its act. Again, we are skeptical. The relevant question is not whether protestant Greene and other nearby residents are sufficiently invested in the premises; the question is whether appellant has established that the operation of the business, if granted the applied-for license, would not interfere with the quiet enjoyment of the property by residents. Appellant offers speculation

regarding the effect the sale of distilled liquor will have on the area; and improperly attempts to shift the burden off himself and onto protestants by claiming "we're all in this together."³

It is worth noting that appellant claims for the first time before this Board that he installed no less than 24 surveillance cameras "to assist local law enforcement," and has invested \$400,000 in "building, landscaping, and maintenance in order to be a better neighbor." (App.Br. at p. 3.) This new testimonial evidence offered on appeal but not at the administrative hearing cannot be considered by the Board now.

In sum, appellant repeatedly asserts that the issuance of a type 21 off-sale general license will improve the character of the community and serve convenience and necessity. Convenience and necessity, however, is not at issue, and all evidence supports the ALJ's conclusion that the applied-for license would aggravate law enforcement problems, disrupt the safe operation of the Boys & Girls Club of Carlsbad, and interfere with the quiet enjoyment of nearby residents.

At the administrative hearing, the burden of proof was on appellant to show why the license should issue. Apart from an unverified petition,⁴ appellant presented no evidence whatsoever, while the Department provided detailed evidence and testimony

³On appeal — and without any apparent sense of irony — both appellant and protestants complain of a mural painted on an exterior wall of the licensed premises and the damage it allegedly does to the community. The mural is protected by the city of Carlsbad and reflects the city's Chicano heritage. Neither this Board nor the Department itself has any control over the existence of the mural, and the mural does not figure into the decision below. We will not address it further.

⁴Appellant did attempt to introduce additional photographic evidence at oral argument. This Board cannot accept or consider new evidence. Appellant's belated offer of proof, however, underscores the need for competent representation — that is, a licensee should avoid facing the Department without the assistance of either an attorney or a layperson familiar with alcoholic beverage law.

establishing crime in the vicinity of the licensed premises, protests from rule 61.4 residences, and an objection from a nonprofit organization protected by section 23789(b). This, as the Department counsel argued, constitutes a "trifecta" of negative factors that would be difficult for *any* applicant to overcome. Appellant did not present evidence sufficient to overcome the law and evidence against issuance of the license he seeks.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.