

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

AB-9627

File: 21-542369 Reg: 16084523

JAMES COLBERT, et al.,
Appellants/Protestants

v.

SMART & FINAL STORES, LLC,
dba Smart & Final #459
2720 Beverly Boulevard, Los Angeles, CA 90057-1008
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: January 11, 2018
Los Angeles, CA

ISSUED FEBRUARY 7, 2018

Appearances: *Appellants/Protestants:* James Colbert, Fred Holt, Tresa Maden, and Terry Manning appearing in propria persona.
Respondents: Joshua Kaplan as counsel for respondent/applicant Smart & Final Stores, LLC, doing business as Smart & Final #459. Jennifer M. Casey as counsel for respondent Department of Alcoholic Beverage Control.

OPINION

James Colbert, Fred Holt, Tresa Maden, and Terry Manning
(appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control¹ granting the application of Smart & Final Stores, LLC, doing business as Smart & Final #459 (respondent/applicant), for an off-sale general license.

1. The decision of the Department, dated January 13, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On February 25, 2014, applicant petitioned for issuance of a type 21 off-sale general license to replace its previous type 20 off-sale beer and wine license. Protests were filed by appellants and by other individuals not party to this appeal. An administrative hearing was held on October 13, 2016. At the hearing, oral and documentary evidence was presented concerning the application and the protests.

Testimony established that the respondent/applicant operates a 17,300 square foot grocery store with its own parking within a gated 1.19-acre lot located along a major thoroughfare, Beverly Boulevard, between South Benton Way and South La Fayette Park Place. The premises is located in a mixed commercial and residential area. There is only one entrance to the premises, from the parking lot along South La Fayette Park Place.

The premises complies with local zoning requirements. On July 14, 2014, the Los Angeles Department of City Planning approved a Conditional Use Permit (CUP) finding the premises consistent with the approved use of the property, "consistent with the intent of the General Plan and Community Plan," and permitting an upgrade from a type 20 to a type 21 alcoholic beverage license. The CUP places a number of conditions upon the premises, to which the applicant has agreed, including, but not limited to, requiring the space devoted to alcoholic beverages not exceed 10% of the total floor area; prohibiting the sale of alcoholic beverages for consumption on-site; prohibiting the consumption of alcoholic beverages on any property adjacent to the premises under the control of the licensee, on any sidewalk, and in the surface parking lot; requiring the

parking area be secured during non-business hours to prevent access by transients and to prevent nuisance activity; requiring security cameras be installed and maintained that cover all common areas of the business, high risk areas, entrances, and exits, with cameras mounted on the exterior of the building to provide views of all areas of the parking lot, and recordings maintained for one month to be made available to the Los Angeles Police Department (LAPD) upon request; requiring a state-licensed uniformed security guard be on the premises during all hours of operation, to patrol the interior and exterior of the premises and "monitor for illegal activities, deter loitering, public drinking, pandering, graffiti, noisy or rowdy behavior, and littering in the parking lot or the sidewalk adjacent to the premises"; requiring a 24-hour "hot line" phone number be posted at the entry and customer service desk for the receipt of complaints from the community, with the log available for inspection by the LAPD, the Department of City Planning and the Department of Alcoholic Beverage Control; requiring "No Trespassing" and "No Loitering" signs; requiring the applicant regularly police the area under its control to prevent littering; and requiring that any sound or noise emitted from the premises comply with the Los Angeles Municipal Code noise regulations.

On June 16, 2015, the Los Angeles Department of City Planning held that "the conditions for the sale and dispensing of a full line of alcoholic beverages for off-site consumption" at the premises was effectuated and satisfied with the Condition Compliance Unit.

There are eight residential structures located within 100 feet of the premises, one of which is a 30-unit building. The Department mailed letters to these residences to

advise them of the application. The Department received nine responses to its letters. Listed concerns included existing homeless and "drunks" in the neighborhood, loitering, crime, and an overconcentration of liquor licenses. There was no claim or complaint of noise emanating from the premises. The Department licensing representative made three visits to the premises and drove by the premises an additional seven times, ranging throughout the day and early evening hours. During all of her visits the licensing representative saw no sign of litter or any homeless loitering on the premises or areas under the control of the applicant. On one occasion in October did she observe graffiti; however, a crew was already there removing it.

There are four consideration points near the premises. Iglesia de Dios Pentecostal is located approximately 594 feet east of the premises, separated by a major thoroughfare (Rampart Boulevard), Benton Way, and various residential and commercial structures, some of which have parking structures. Christ Covenant Church of Los Angeles is located approximately 207 feet west of the premises and is separated from it by a secondary street (South La Fayette Park Place), a commercial building with parking lot, and a grocery store. The Light Mission Church is located approximately 395 feet west of the premises, separated by a secondary street (South La Fayette Park Place), various commercial buildings with parking, and an alleyway. Finally, New Village Charter High School is located approximately 520 feet northwest of the premises, separated by a major thoroughfare (Beverly Boulevard) and Occidental Boulevard, with no common view of the premises. The Department contacted these four consideration

points to advise them of the pending application. None of the four filed a protest or otherwise responded.

The premises is located in census tract 2086.20. Using the formula set forth in the Alcoholic Beverage Control Act, two off-sale licenses are permitted within this census tract. As of the date the application was filed, three off-sale licenses existed. The premises was one of those three existing off-sale licenses.

The premises has been licensed and operating as a type 20 off-sale beer and wine premises since March 15, 1995, with the current applicant holding that license. The type 20 license has been disciplined twice: in 2013 for a license condition violation (Bus. & Prof. Code, § 23804) and in 2014 for the sale of an alcoholic beverage to a minor (Bus. & Prof. Code, § 23658(a).)

The LAPD has jurisdiction over the area where the premises is located. The premises is located in LAPD reporting district 233. Using the formula set forth in the Alcoholic Beverage Control Act, the average number of offenses per district is 179, making the high-crime threshold 215 offenses. Reporting district 233 has 174 offenses.

There is one off-sale licensed premises within a 1,000 foot radius of the premises. It is a type 20, off-sale beer and wine license, and is located 285 feet west of the premises.

The Los Angeles City Council, on December 16, 2014, determined public convenience or necessity would be satisfied for off-site consumption alcohol sales at the premises and that it will not tend to create a law enforcement problem.

The Department recommended a series of conditions be attached to the applied-for license, should it issue. These conditions are listed on the Petition for Conditional License as follows:

- 1 Sales and service of alcoholic beverages shall be permitted only between the hours of Sunday through Thursday 7:00 a.m. to 10:00 p.m. and Friday and Saturday 7:00 a.m. to 11:00 p.m.
- 2 There shall be no amusement machines or video game devices in the premises at any time.
- 3 The petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control, as depicted on the ABC-257 dated 1/17/14 and ABC-253 dated 1/17/14.
- 4 The parking lot of the premises shall be equipped with lighting of sufficient power to illuminate and make easily discernible the appearance and conduct of all persons on or about the parking lot. Additionally, the position of such lighting shall not disturb the normal privacy and use of any neighboring residences.
- 5 No beer or malt beverage products shall be sold, regardless of size, in quantities of less than six per sale.
- 6 Distilled spirits shall not be sold in bottles or containers smaller than 750 ml. and pre-mixed distilled spirit cocktails must be sold in manufacturer pre-packaged multi-unit quantities.
- 7 No wine shall be sold with an alcohol content of greater than 15% by volume except for "Dinner Wines" which have been aged two years or more and maintained in corked bottles.
- 8 There shall be no cups, glasses, or similar receptacles commonly used for the drinking of beverages, sold, furnished, or given away in quantities of less than their original multi-container package.
- 9 No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee(s) as depicted on the ABC-257 dated 1/17/14 and ABC-253 dated 1/17/14.
- 10 There shall be no exterior advertising or sign of any kind or type, including advertising directed to the exterior from within, promoting

or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverages or signs which are clearly visible to the exterior shall constitute a violation of this condition.

- 11 All ice shall be sold at or about prevailing prices in the area and in quantities of not less than five (5) pounds per sale and shall not be given away free.
- 12 The possession of alcoholic beverages in open containers and the consumption of alcoholic beverages is prohibited on or around these premises as depicted on ABC-253, dated 1/17/14.
- 13 Loitering is prohibited on or around these premises or this area under the control of the licensee(s) as depicted on the ABC-257 dated 1/17/14 and ABC-253 dated 1/17/14.
- 14 Any graffiti painted or marked upon the premises or on any adjacent area under the control of the licensee(s) shall be removed or painted over within 24 hours of being applied.
- 15 The petitioner(s) shall post and maintain a professional quality sign facing the premises parking lot(s) that read[s] as follows:

NO LOITERING, NO LITTERING,
 NO DRINKING OF ALCOHOLIC BEVERAGES

 VIOLATORS ARE SUBJECT TO ARREST

The sign shall be at least two feet square with two inch block lettering. The sign shall be in English and Spanish.
- 16 Deliveries of any type to the premises shall be made no earlier than 8:00 a.m. nor later than 6:00 p.m. on Saturday and Sunday and no earlier than 6:00 a.m. nor later than 8:00 p.m. Monday through Friday.

(Exh. A1, Petition for Conditional License.) In the Department's opinion, these conditions should alleviate and mitigate any nuisance concern, adverse impact to nearby residences, and protestant concern from issuance of the license. Accordingly, the Department recommended the license issue subject to these conditions.

Protestant Tresa Maden appeared and testified at the hearing. She described "at one point in time" observing homeless camping outside the gated area of the premises on the city beltway lawn, and a "week or more" ago a homeless man in front of the premises, all of whom were removed. She observed over "several years" a taco stand vendor on the public sidewalk on Beverly Boulevard, and many times observed law enforcement escorting them away. She mentioned seeing a taco stand on the premises parking lot, but did not mention when this occurred or whether it occurred within the recent past. She further testified to seeing in the community "loitering, trespassing," and "people laid out in different areas because they consumed too much alcohol."

Protestant Danielle Wencil appeared and testified at the hearing. Wencil said she found the premises to provide "great service, customer service," found the employees "are great," and the store was always found "in great condition." Her concern related to the exterior lighting in the parking lot, which she believed was not sufficient. She acknowledged that she did not go to the premises at night, but does her shopping before dark. She testified to children living and playing nearby. She observed homeless people near her residential unit and testified about having to chase them off. She further testified that two years prior she saw the security caps from Jack Daniels and Jägermeister bottles, but did not specify whether she saw them on the premises or its parking lot. She was not sure from where the security caps came.

Protestants were mainly concerned with overconcentration of liquor licenses, in addition to the concerns as described above. During the Department's investigation and

multiple visits to the premises and surrounding area, the Department representative observed no homeless loitering or littering.

The applicant's store manager, Rosa Reyes, appeared and testified at the hearing. She has been working for the applicant for the last two years on a 40 hour work week, from 6:00 a.m. to 5:00 p.m. During her employment she has never observed any person drinking alcoholic beverages or loitering, or any food vendor or homeless persons on the premises or its parking lot. The applicant has a security guard who patrols and polices the premises, including the parking lot, ensuring there is no loitering, homeless, or illegal activities occurring.

Michael Mahakian, applicant's district manager since January 1, 2016, appeared and testified at the hearing. He visits the premises once weekly. On his visits he has never observed anyone drinking alcoholic beverages on the premises. On two occasions he has observed persons loitering outside the premises' gate and immediately telephoned the police. It is protocol for all employees to notify the police if they observe anyone loitering or engaging in improper conduct on or about the premises.

The applicant maintains that it is a good neighbor. It has installed a security camera system to monitor both the interior and exterior of the premises and parking lot. It also has a security guard patrolling the exterior of the premises under the licensee's control during operating hours. All of the applicant's employees are required to and do attend the LAPD's "Standardized Training for Alcohol Retailers" (STAR). The applicant requires its employees to ask for identification relating to sales of age-restricted items

and to enter the birthdate into the register to prevent sales of alcoholic beverages to minors. The applicant's employees maintain the premises interior and exterior, including parking lot, to ensure they are free of litter and loitering, and to address any community concerns. The applicant promised the sales of alcoholic beverages will be incidental to its other grocery item sales. Distilled spirits and beer will not be refrigerated. Distilled spirits will be located in front of the store, close to the cash registers, "in constant view of store personnel." The applicant further agreed to abide by a multitude of CUP and Department conditions restricting its license and business operations.

After the hearing, the Department issued its decision, which denied appellants' protests and allowed the license to issue.

Appellant then filed this appeal contending the Department's findings are not supported by the evidence, and that the ALJ ignored evidence submitted by appellants/protestants.

DISCUSSION

Appellants/protestants individually raise several complaints regarding the Department decision.

Appellant James Colbert contends that issuance of the license will do irreparable harm to the surrounding community. (App.Br., James Colbert, at p. 1.) He points out that "[t]here are schools, churches, [and] recovery homes" in the area "that are also opposed to this license" and will suffer "negative repercussions" if the license issues. (*Ibid.*) Colbert states that, in the area around the premises, there is "always gang-related violence, shootings, graffiti, harassment, public intoxication, loitering, and an

increasing issue with homeless roaming around." (*Ibid.*) Moreover, he states "that there was a homicide right in front of [his] residence, near Smart & Final" and that on the night before he wrote his brief, his "wife was walking [their] dogs and several men that appeared to be drunk, tried to rob her." (*Ibid.*)

Appellant Fred Holt contends the Department's investigation into the licensed premises was inadequate and "inconsistent with the level of procedure applied to this type of matter." (App.Br., Fred Holt, at p. 1.) Holt claims the investigation therefore overlooked criminal conduct near the licensed premises, including "progressive gang-related activities, including graffiti, violent assaults and domestic terrorism," "[h]omelessness and public intoxication," and "a homicide that occurred right in front of the [premises], in broad daylight." (*Ibid.*)

Appellant Tresa Maden reasserts the arguments she made before the ALJ, but adds that crime in the area has recently gotten out of control, and that on "May 20, 2017 a young man was murdered on [her] property" after "the young man and [his] friends were at Smart & Final shoplifting for Modelo beer." (App.Br., Tresa Maden, at p. 1.) Maden directs this Board to "the high crime rate . . . in [her] community alone." (*Ibid.*)

Appellant Terry Manning expresses deep concern about the effect of an additional alcoholic beverage license on the surrounding community. (App.Br., Terry Manning, at p. 1.) Manning states that the area has the highest rate of hit-and-run car accidents and that, according to a local school principal, children are more likely to be killed by a drunk driver than injured on the playground. (*Ibid.*) Additionally, Manning points out that "the closest bus stop is directly in front of Smart & Final" and according

to the local school principal, this will expose female students to street harassment. (*Ibid.*) Finally, Manning claims the area already suffers from a number of problems, including "noise nuisance, antisocial behavior at all hours of day and night," "loitering and unsightly walkways," "[g]ang related activities, hit and runs, homicides, exposure of drunken homeless people on the sidewalks, [and] harassment by group[s] of drunken people" near the premises. (*Id.* at pp. 1-2.)

In sum, appellants challenge the Department's conclusion that the license conditions "set forth in the Petition for Conditional License imposed upon the licensee should be sufficient to mitigate any adverse impact to the quiet enjoyment of nearby residents and concern of the Protestants." (Conclusions of Law, ¶ 5.) Together, appellants argue the evidence does not support this conclusion, and that there is additional evidence that either was not presented at the administrative hearing, or that the Department chose to ignore. (See generally App.Br.) Appellants seek relief in order to protect their community. (*Ibid.*)

As an initial matter, this Board is limited to review of evidence presented at the administrative hearing. (See Bus & Prof. Code, § 23083(a).) The Board cannot accept additional evidence or hear new testimony.² We therefore disregard the photographs appended to appellants' briefs, which were not entered into evidence at the

2. Remand for additional evidence is available only if the evidence was not previously discoverable. (See Code Regs., tit. 4, § 198.) The party seeking to present new evidence must submit an affidavit describing its relevance and explaining why the evidence could not have been produced at the administrative hearing. (*Ibid.*) No such claims or affidavits have been made or submitted in this case.

administrative hearing, along with the commentary accompanying them.³ (See App.Br., Terry Manning, at pp. 3-7; App.Br., Tresa Maden, at pp. 2-7.) We must also disregard letters submitted by Iglesia Cristiana Elim and the New Village Girls Academy, both of which were submitted after the Department had issued its final decision. (See letter from Pastor Juan Argueta, Iglesia Cristiana Elim, Nov. 21, 2017; letter from Yadira De La Cruz-Hernández, New Village Girls Academy, Jan. 19, 2017.) Finally, we must disregard appellants' testimony regarding recent crimes insofar as they were not addressed at the administrative hearing, as counsel for the Department and the applicant were not given the opportunity to cross-examine appellants regarding these alleged facts, and the ALJ did not have an opportunity to rule on their relevance. (See, e.g., App.Br., James Colbert, at p. 1 [gang activity, murder, wife's alleged robbery]; App.Br., Fred Holt, at p. 1 [gang activity, "domestic terrorism"]; App.Br., Tresa Maden, at p. 1 [murder, shoplifting]; App.Br., Terry Manning, at p. 1 [gang activity, hearsay evidence regarding hit-and-run accident rate].)

This Board reviews an appeal using the substantial evidence rule and is bound by the Department's factual findings absent an abuse of discretion:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citation.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts

3. Appellant Manning attempted to enter some photographs into evidence at the administrative hearing. The photographs, however, were electronic; they had not been printed and therefore could not be marked or admitted in evidence. (RT at p. 99.)

and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

On appeal, the burden lies with appellants to show that substantial evidence does not exist:

The substantial evidence rule requires the trial court to start with the presumption that the record contains evidence to sustain every finding of fact. [Citation.] The burden is upon the appellant to show there is no substantial evidence whatsoever to support the findings. [Citation.] The trier of fact . . . is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; it is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence. [Citation.]

(Pescosolido v. Smith (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].)

"[W]here there is no conflict in the evidence supporting the finding, then 'the conclusions or determinations reached present questions of law subject to review for correctness, jurisdictional excess or any resulting abuse of discretion.'" *(Sepatis v. Alcoholic Bev. Control Appeals Bd. (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], quoting Rice v. Alcoholic Bev. Control Appeals Bd. (1979) 89 Cal.App.3d 30, 35 [152 Cal.Rptr. 285].)*

Section 23958 of the Business and Professions Code requires the Department to conduct a "thorough investigation to determine whether the applicant and the premises for which a license is applied qualify," and further, to "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, except as provided in Section 23958.4." (Bus. & Prof. Code, § 23958.)

Section 23958.4, subdivision (a), defines an "undue concentration" of licenses in terms of both the number of licenses in the census tract and the level of crime in the local reporting district:

(a) For purposes of Section 23958, "undue concentration" means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where any of the following conditions exist:

(1) The applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, as defined in subdivision (c), than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency.

[¶ . . . ¶]

(3) As to off-sale retail license applications, the ratio of off-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of off-sale retail licenses to population in the county in which the applicant premises are located.

(Bus. & Prof. Code, § 23958.4(a)(1) and (3).) Subdivision (b) of the statute then permits issuance of a license despite undue concentration under specific exceptions. (See Bus. & Prof. Code, § 23958.4(b) ["Notwithstanding Section 23958, the department may issue a license as follows. . . ."].) Subdivision (b)(1) addresses nonretail licenses, while subdivision (b)(2) provides an exception for "any other license," including off-sale retail licenses, "if the local governing body of the area in which the applicant premises are located, or its designated subordinate officer or body, determines within 90 days of notification of a completed application that public convenience or necessity would be

served by the issuance." (Bus. & Prof. Code, § 23958.4(b)(2).) The court of appeal has held that the Department is entitled to rely on the local governing body's determinations regarding public convenience and necessity and need not conduct its own investigation into the issue. (*Nick v. Dept. of Alcoholic Bev. Control* (2014) 233 Cal.App.4th 194, 205-206 [182 Cal.Rptr. 182].)

Additionally, rule 61.4 provides:

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.

(Code Regs., tit. 4, § 61.4.) The rule provides an exception, however: "Notwithstanding the provisions of this rule, the department may issue an original retail license . . . where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment of the property by residents." (*Ibid.*)

In this case, the ALJ made the following relevant findings of fact:

6. The Premises is located in census tract 2086.20. Using the formula set forth in the Alcoholic Beverage Control Act, two off-sale licenses are permitted within this census tract. As of the date the application was filed, three off-sale licenses existed. The Premises was one of those three existing off-sale licenses.

[¶ . . . ¶]

8. The LAPD has jurisdiction over the area where the Premises is located. The Premises is located in LAPD reporting district 233. Using the formula set forth in the Alcoholic Beverage Control Act, the average number of offenses per district is 179, making the high-crime threshold 215 offenses. Reporting district 233 has 174 offenses.

[¶ . . . ¶]

10. The City Council for the City of Los Angeles, on December 16, 2014, determined public convenience or necessity would be satisfied for off-site consumption alcohol sales at the Premises and that it will not tend to create a law enforcement problem.

(Findings of Fact, ¶¶ 6, 8, 10.) Additionally, the ALJ described the conditions included on applicant's Petition for Conditional License and found that, "[i]n the Department's opinion, these conditions should alleviate and mitigate any nuisance concern, adverse impact to the nearby residences and Protestant concern from issuance of the license."

(Findings of Fact, ¶ 11.)

The ALJ also noted the protestants' objections and made the following findings based on them:

12. Protestant Tresa Maden appeared and testified at the hearing. . . . She described "at one point in time" observing homeless camping outside the gated area of the Premises on the city beltway lawn, and a "week or more" ago a homeless man in front of the Premises, all of whom were removed. She observed over "several years," a taco stand vendor on the public sidewalk on Beverly Boulevard, and many times observing law enforcement escorting them away. She mentioned seeing a taco stand on the Premises parking lot, but did not mention when this occurred or that it occurred within the recent past. She further testified to seeing in the community "loitering, trespassing," and "people laid out in different areas because they consumed too much alcohol."

Protestant Danielle Wencil appeared and testified at the hearing. . . . Protestant Wencil said she found the Premises to provide "great service, customer service," found the "employee's [*sic*] are great," and the store was always found "in great condition." Her concern related to the exterior lighting in the parking lot, which she believed was not sufficient. She acknowledged that she did not go to the Premises at night, but does her shopping before it gets dark. She testified to children living and playing nearby. She observed homeless people near her residential unit and testified about having to chase them off. She further testified that two years prior she saw the security caps from Jack Daniels and Jagermeister [*sic*] bottles, but did not specify whether she saw them on the Premises or its parking lot. She was not sure from where the security caps came.

The Protestants were mainly concerned with overconcentration of liquor licenses, in addition to the above-testified to concerns. During the Department's investigation and multiple visits to the Premises and surrounding area, the Department representative observed no homeless loitering or littering.

(Findings of Fact, ¶ 12.)

With regard to the crime rate and overconcentration of licenses, the ALJ reached the following conclusions of law:

8. Section 23958.4 sets forth a two-prong test for determining whether an area has an over-concentration of licenses. The first prong relates to the number of reported crimes in the relevant reporting district, while the second relates to the number of licenses within the relevant census tract. An area is over-concentrated if either prong is met. Even if an area is over-concentrated, the license may still issue if the Applicant demonstrates that public convenience or necessity would be served.

9. With respect to the first prong, section 23958.4 provides that a reporting district is high crime (and, therefore, over-concentrated) if it has a 20 percent greater number of reported crimes, as defined, than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency. In the present case, the average number of offenses for all reporting districts covered by LAPD is 179, making the high-crime threshold 215. The actual number of offenses in the reporting district in which the Premises is located was 174. The area in which the Premises is located is not over-concentrated based on crime.

10. The second prong of section 23958.4 provides that, with respect to off-sale retail licenses, a census tract is over-concentrated if the ratio of off-sale retail licenses to population in the census tract in which the applied-for premises is located exceeds the ratio of off-sale retail licenses to population in the county in which the applied-for premises is located. At the time the application was filed, the Premises was located in census tract 2086.20. Two off-sale licenses are permitted in this census tract, and three exist. Since the applied for license will replace an existing license at the Premises there is no increase in the license count (Findings of Fact ¶¶ 6 & 7). Therefore, the applied-for license would not result in or add to an undue concentration of licenses.

11. Since the area in which the Premises is located does not have an over-concentration of licenses, a determination of public convenience or

necessity is not necessary before a license may issue. Despite this fact, the Los Angeles City Council made a determination that public convenience or necessity would be satisfied for off-site consumption alcohol sales at the Premises and that it will not tend to create a law enforcement problem. (Finding of Fact ¶10.)

12. Alternately, and without regard to census tracts, an excess number of licenses in a given area is also grounds for denying an application. Unlike the statutory definition of over-concentration, there is no set formula for determining what constitutes an excess number of licenses; rather, the overall impact of the license, should it issue, must be examined. The two over-concentration issues overlap to some degree and, while legally separate, are factually intertwined.

13. In the present case, there is one off-sale license, a type 20, off-sale beer and wine license, within 1,000 feet of the Premises. Given the mixed residential and commercial area this does not appear to be excessive. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶¶ 8-12.)

Appellants do not directly challenge the ALJ's calculations regarding the crime rate or number of licenses. (See generally App.Br.) Instead, appellants provide firsthand descriptions of crime they have witnessed in the area—in particular, crime they claim is connected with the sale and consumption of alcoholic beverages, which they contend will be aggravated if the applied-for license is granted.

While we do not doubt the veracity of appellants' account of local crime, section 23958.4, subdivision (a)(1), provides a purely objective mathematical calculation for determining whether a census tract is high-crime. (See Bus. & Prof. Code, § 23958.4(a)(1).) Statistical evidence of the crime rate in the census tract and countywide constitutes substantial evidence to support the ALJ's conclusion that the census tract is not high-crime, and individual accounts describing specific criminal

activity are not sufficient to undermine those calculations. This Board must defer to the ALJ's proper application of the law over appellants' firsthand accounts.

Similarly, subdivision (a)(3) provides for a concrete calculation of the number of licenses allowed in a census tract. (Bus. & Prof. Code, § 23958.4(a)(3).) Appellants do not dispute the ALJ's calculations, nor do they dispute the finding that the applicant will surrender its previous type 20 license upon issuance of its type 21 license, resulting in no net change to the number of licenses. (See generally App.Br.) Substantial evidence therefore supports the ALJ's conclusions on this point as well.

Lastly, appellants do not challenge the city's finding of public convenience or necessity. (See generally App.Br.) Based on the ALJ's reasonable findings that neither subdivision (a)(1) nor (a)(3) of section 23958.4 applies in the present case, a finding of public convenience or necessity is not absolutely necessary. Nevertheless, it supplies persuasive evidence that the city does not share appellants' concerns about the impact applicant's license will have, and the ALJ was entitled to rely on the city's finding.⁴ (See *Nick, supra*, at pp. 205-206.)

We find that substantial evidence supports the ALJ's conclusion that issuance of the license is not prohibited by section 23958.4.

With regard to rule 61.4, the ALJ reached the following conclusions of law:

5. There are eight residential structures located within 100 feet of the Premises. As such, Rule 61.4 applies. There was no concern of noise emanating from the Premises. Rather protest concern for nearby residents related to preventing homeless, loitering, or drinking of alcoholic beverages on the Premises and its parking lot due to their concern of the

4. The city appears to have alleviated any concerns it had by attaching a number of conditions to the applicant's CUP. (See Findings of Fact, ¶ 3.)

existing homeless and "drunks" in the neighborhood, and having sufficient lighting in the Premises parking lot. While the Protestants did not raise the latter issue of lighting as an issue in their protests, the Department included a condition to address lighting in the parking lot. The condition requires the licensee keep its parking lot well lit, sufficient enough "to illuminate and make easily discernable the appearance and conduct of all persons," while not to disturb the normal privacy and use of any nearby residents. There was no evidence of any homeless, loitering, littering or drinking of alcoholic beverages on the Premises or its parking lot. If there was any loitering or homeless near the Premises, it was clear from the evidence that the offending parties were escorted away by law enforcement. The Department licensing representative made multiple visits to the Premises at various times of the day and in the early evening, and she found no littering, or homeless loitering on or about the Premises. The Petition for Conditional License requires the licensee to prevent people from loitering, littering or drinking alcoholic beverages about the Premises under the control of the licensee. The licensee has no authority to police people's behavior on public sidewalks, and areas beyond the licensee's control. These conditions along with the additional conditions set forth in the Petition for Conditional License imposed upon the licensee should be sufficient to mitigate any adverse impact to the quiet enjoyment of nearby residents and concern of the Protestants.

Furthermore, the Applicant has made special efforts to ensure the operation of the Premises does not disturb the nearby residents and is a good neighbor. These efforts include, but are not limited to, hiring a security guard to patrol the Premises and its parking lot during operating hours, maintaining the Premises and its parking lot free of litter, graffiti, loitering, and consumption of alcoholic beverages, as well as agreeing to install professional signs stating "NO LOITERING, NO LITTERING, NO DRINKING OF ALCOHOLIC BEVERAGES — VIOLATORS ARE SUBJECT TO ARREST." The licensee has in place a policy requiring staff to immediately contact law enforcement immediately upon becoming aware of any such offense or wrongdoing upon the Premises under the control of the licensee. There is no evidence to the contrary. As such, operation of the Premises, subject to the conditions set forth in the Petition for Conditional License, would not adversely affect the quiet enjoyment of nearby residents. (Findings of Fact ¶¶ 3, 4, 11-14.)

(Conclusions of Law, ¶ 5.)

At the administrative hearing, Tresa Maden and Danielle Wencil testified to the contrary.⁵ (Findings of Fact, ¶ 12.) Maden, in particular, described extensive homelessness in the area and ongoing crime, including two murders in the previous year. (RT at pp. 93-94, 96.) Terry Manning,⁶ in her closing statement, described the neighborhood's struggle with crime:

We're at war in our neighborhood, and we're on fire. We don't need anybody, whether how good their intentions are or they say they are, pouring fuel on our fire we're trying to put out. And that's what I have to say. No matter how many cameras, security guards or their good intentions are said to be, they don't live there; we do, and that's not what we're seeing.

(RT at p. 109.)

There is, however, contrary testimony. Applicant's store manager, Rosa Reyes, who has worked at the premises for two years, testified that staff police the parking lot "[a]bout 10 times a day." (RT at p. 32.) She claimed applicant's security guard is "outside most of the time" to patrol the parking lot. (RT at p. 38.) She stated there hasn't been any drinking or loitering in the premises' parking lot, and upon cross-examination by appellant Manning, stated she could "guarantee" there would be no such activity if the license issued. (RT at pp. 33-34.)

Applicant's district manager, Michael Mahakian, testified that he visits the premises every week or two. (RT at p. 21.) He stated that during his visits this year he has not observed, even once, anyone drinking in the premises' parking lot. He stated

5. Wencil is not party to this appeal.

6. Manning, a protestant and party to this appeal, did not testify at the administrative hearing, but questioned witnesses and argued on behalf of protestants generally.

that he has seen people loitering, but that when it has happened, either the store manager or an associate has immediately called the police. (RT at p. 22.) Upon cross-examination by appellant Manning, Mahakian stated he had never seen homeless with mattresses near the premises. (RT at p. 26.) He has seen homeless near the premises, but again, applicant's staff immediately called the police. (RT at p. 27.) He added that if they did see homeless, premises staff "wouldn't physically move them" but would "call the police immediately." (RT at p. 26.)

Finally, the Los Angeles City Council concluded that issuance of the applied-for license, with conditions imposed on the CUP, "will not tend to create a law enforcement problem." (Exh. A3, Los Angeles City Council Action, File No. 14-1470, Dec. 16, 2014, at p. 2.)

As discussed above, this Board must defer to the ALJ's reasonable findings of fact, provided they are supported by substantial evidence. The ALJ weighed firsthand accounts of local crime—based on testimony from the appellants/protestants—against statistical evidence of crime and license concentration, testimony from applicant's staff, and the conclusions reached by the Los Angeles City Council. The ALJ favored the latter evidence and concluded issuance of the license "would not adversely affect the quiet enjoyment" of appellants and other nearby residents. (Conclusions of Law, ¶ 5.) The ALJ's factual findings are unquestionably supported by substantial evidence. This Board, while sympathetic to appellants' concerns, does not have the authority to overturn these findings.

ORDER

The decision of the Department is affirmed.⁷

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

7. This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.