

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

AB-9051

File: 42-454582 Reg: 09070645

SPANISH IMPORT NETWORK, INC., dba Industrial Strip
12317 Branford Street, Sun Valley, CA 91352-1012,
Appellant/ Applicant

v.

LOS ANGELES POLICE DEPARTMENT,
Respondent/Protestant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jonathon E. Logan

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED AUGUST 17, 2010

Spanish Import Network, Inc., doing business as Industrial Strip (appellant/applicant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the protest of Los Angeles Police Department (respondent/protestant) against issuance of an on-sale beer and wine public premise license.

Appearances on appeal include appellant/applicant Spanish Import Network, Inc. (Spanish Import), appearing through its counsel, Roger J. Diamond; respondent/protestant Los Angeles Police Department (LAPD), appearing through Captain Joseph M. Hiltner; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated July 13, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On June 1, 2007, applicant petitioned for issuance of an on-sale beer and wine public premises license for a proposed "adult cabaret." A protest was filed by LAPD in June 2007, and the Department conducted a lengthy investigation.

During the time the Department was conducting its investigation, applicant was also in the process of obtaining a Conditional Use Permit (CUP) from the Los Angeles Zoning Commission and a café show entertainment permit from the Los Angeles Police Commission. In order to operate as a topless cabaret serving alcohol, with patronage limited to those 21 years of age and older, applicant needed to have both the CUP from the Zoning Commission and the alcoholic beverage license from the Department. In August 2007, applicant had not yet obtained the CUP or the liquor license, but the Police Commission issued it an entertainment permit. Therefore, applicant decided to operate the business as a "totally nude theater" without alcohol while waiting for the needed CUP and license. "Industrial Strip" opened on October 4, 2007, offering soft drinks, totally nude dancing, and lap dances. The business is apparently open to people 18 years of age and older.

The Department's investigation showed that the issues raised in the protest by LAPD – high crime, prostitution, narcotic sales, drinking in public, and driving under the influence – were unsupported. The numbers provided by LAPD showed that the premises was not in a high crime reporting district, and six reports of arrests for prostitution in 2008 all occurred over one mile from the premises in an adjoining reporting district. The proposed premises is located in an industrial area with no residences closer than several blocks away.

The report concluded that the protest issues did not provide cause for imposing conditions on the license, but eight conditions were recommended for the license because the operation was an adult business. Applicant agreed to the conditions and filed a Petition for Conditional License on January 1, 2009, incorporating those conditions. The Petition was sent through the appropriate channels at the Department and the license was approved for issuance on February 28, 2009. A hearing on the LAPD protest was scheduled for April 29, 2009. At the hearing, the Department intended to recommend approval of the license and rejection of the protest.

On the day before the April 29 protest hearing, applicant was told that the Department was reversing its position and would be recommending denial of the license at the hearing. The Department's belated change of position was the result of information it received that LAPD had recently arrested four women in the premises for soliciting acts of prostitution. One of the arrests was in February 2009 and the other three were on April 21, 2009, just a week before the hearing.

At the commencement of the hearing on April 29, 2009, counsel for the Department presented the administrative law judge (ALJ) and counsel for applicant a document entitled Notice of Denial and Amendment to the Statement of Issues to be Determined. This stated, in pertinent part:

Issuance of the applied-for license would be contrary to public welfare or morals as provided in Article XX, section 22 of the Constitution of the State of California and section 23958 of the Business and Professions Code. Without limitation to the foregoing, it is more specifically alleged that:

- a. Issuance of the applied-for license would tend to create or aggravate an existing law enforcement problem.
- b. From February 2009 through April 2009, there were approximately four arrests for prostitution inside the applied-for premises.

Although uncomfortable waiving the issue of inadequate notice of the Department's change of position, applicant elected to proceed with the hearing because the license application had been pending for almost two years. Counsel asserted that each day the business operated without a liquor license, applicant suffered financially.

The Department first presented the testimony of Sheriff Ali, a supervising investigator with the Department, regarding the license application investigation conducted by the Department. The report of the investigation was admitted into evidence as Exhibit 3. Ali confirmed that the investigation showed LAPD's protest issues to be unsubstantiated.

Two LAPD vice officers then testified about the arrests made in the premises on April 21, 2009. The officers said they were in plain clothes and were approached by premises entertainers who offered to do lap dances for a certain amount and to perform sexual acts for additional amounts. Both officers had been to the premises before, but no violations were found the other times.

LAPD vice officer Luna, the lead officer of the unit that made the arrests on April 21, 2009, as well as the unit's liaison with the Department, then testified. Officer Luna was apparently responsible for preparing the protest against applicant's application for license. She testified that her unit had gone to the premises to check for prostitution soliciting in November and December of 2008 and January 2009 in addition to the February and April visits during which the arrests were made. No violations were found during the November, December, or January visits. No reports, other than expense reports, were made of the visits that resulted in no arrests. No recording or sound transmission devices were worn by the officers during any of the visits to the premises.

In the decision issued subsequent to the hearing, the Department sustained the protest. However, the order also provided that if applicant signed and filed with the Department a new Petition for Conditional License that included the 19 conditions set out in an attachment to the decision, the protest would be overruled and the license, with the specified conditions, would be allowed to issue.

Appellant/applicant Spanish Import has filed an appeal contending the conclusion is not supported by the findings. In addition, it argues that 7 of the 19 proposed conditions are punitive, unrelated to the problem alleged, oppressive, redundant, violative of the First Amendment, and/or unnecessary, and that the license should issue with the conditions originally agreed to by applicant.

DISCUSSION

Applicant contends insufficient evidence exists to support the finding of a law enforcement problem. Applicant argues that no evidence was presented that the women arrested had been tried or even charged, that they must be considered innocent until proven guilty, and that arrests are insufficient to support the finding that a law enforcement problem existed.

Applicant believes that the arrests made just before the hearing were "set-ups," by LAPD to prevent the Department from overruling LAPD's protest and issuing the license. The Board, however, need not reach that question.

A law enforcement problem is a basis for denial of an application (Bus. & Prof. Code, § 23958), and grounds for denial of an application may be removed by placing reasonable conditions on a license (Bus. & Prof. Code, § 23800, subd. (a)). The ALJ stated, in Conclusion of Law (CL) 7, that "Arrests for soliciting acts of prostitution constitute a law enforcement problem." Although a law enforcement problem is a basis

for denial of the license, the ALJ concluded that "an isolated violation of soliciting prostitution" would not preclude issuance of the license "with conditions tailored to address law enforcement concerns and violations which triggered the Department's denial." Therefore, the ALJ devised 19 conditions for the license and made issuance of the license dependent on appellant agreeing to them. Some of these conditions were the same as, or similar to, the conditions applicant agreed to before and some were new.

Imposition of these conditions, however, is based on the erroneous conclusion that a law enforcement problem existed. The statement in CL 7 that "Arrests for soliciting acts of prostitution constitute a law enforcement problem," could perhaps be an accurate statement in some conceivable circumstance, but this is not that circumstance. The four arrests here do not constitute a law enforcement problem as that term has been used in California case law.

The cases dealing with law enforcement problems have consistently required more than a few violations on one or two occasions to constitute a law enforcement problem. Rather, the existence of a law enforcement problem must be supported by substantial evidence of repeated and on-going criminal activity in connection with the applicant's premises or locale. In *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (1981) 122 Cal.App.3d 549 [175 Cal.Rptr. 342], the court reviewed earlier cases involving law enforcement or police problems:

"Police [problems]" were cited as a basis for denial of a liquor license long before Business and Professions Code section 23958 was amended in 1963 to explicitly authorize it where issuance "would tend to create a law enforcement problem" (Stats. 1963, ch. 1642, § 2, p. 3232.) Thus, in *Parente v. State Board of Equalization* (1934) 1 Cal.App.2d 238 [36 P.2d 437], a denial was upheld where the respondent board had before it evidence of a long-standing, "continuous police

problem" at the applicant's premises, which the court interpreted as referring to "the difficulty of controlling the lawless, the idle, the dissolute and the criminal element of a city tending to congregate at a designated place . . ." (*Id.*, at pp. 244-246.) In *Torres v. Dept. Alcoholic Bev. Control* (1961) 192 Cal.App.2d 541 [13 Cal.Rptr. 531], the court was concerned with the added difficulty of enforcing liquor control laws in an area of "undue concentration" of licensed establishments in which 75 arrests were made each week for public drunkenness and other offenses. (*Id.*, at pp. 546-547.) In *Harris v. Alcoholic Bev. Con. Appeals Bd.* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74], revocation of an establishment's license was justified by the fact that intoxicated persons were arrested there almost daily. (*Id.*, at pp. 114-120.) More recently, in *Kirby v. Alcoholic Bev. etc. Appeals Bd. (Schaeffer)* (1972) 7 Cal.3d 433 [102 Cal.Rptr. 857, 498 P.2d 1105], the Supreme Court upheld a determination that issuance of an off-sale beer and wine license would create a law enforcement problem where the evidence showed that the proposed premises were located at the edge of the campus of the University of California at Santa Barbara, in a small community nearly surrounded by the campus; that the village had the highest crime rate in the county; that at least 50 to 60 percent of persons arrested there were under the influence of alcohol; and, critically, that there had recently been a number of riots and other University-related disturbances (including the burning of a bank) in the immediate vicinity of the premises, which prompted concern that in any future disturbance the establishment might be broken into and liquor consumed by looters and rioters. (*Id.*, at pp. 437-441.) Nothing in these decisions supports the department's view of what constitutes a law enforcement problem. In all of them, there was repeated or on-going criminal conduct of legitimate and substantial concern to law enforcement agencies

(122 Cal.App.3d at pp. 556-557, fn. 6.)

Although the Department is accorded great discretion in granting or denying license applications, that discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license "for good cause" necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals." (*Martin v. Alcoholic Bev. etc. Appeals Board* (1961) 55 Cal.2d 867, 876 [362 P.2d 337; 13 Cal. Rptr. 513].)

This Board can only conclude that the Department exceeded the bounds of its discretion in this decision because the evidence did not support the finding that a law enforcement problem existed. Because no law enforcement problem existed, it was error for the Department to sustain LAPD's protest and use that as the basis for imposing conditions on the license. Since the only basis in the decision for the conditions devised by the ALJ was the erroneous finding of a law enforcement problem, imposition of those conditions was also erroneous. Striking the erroneous provisions from the Department's Order will leave extant the denial of an application for an unconditional license,² the requirement that applicant submit an acceptable Petition for Conditional License (which it has already done), and the issuance by the Department of a Type 42 license with conditions. Eliminating the erroneous provisions should, in effect, return this matter to its status before the Department issued its ill-conceived and belated Notice of Denial.

ORDER

The decision of the Department is reversed with respect to sustaining the protest of the Los Angeles Police Department as providing a legal basis for conditions on the license and requiring the applicant to sign and submit the specific Petition for Conditional License attached to the decision. The matter is remanded to the

²It is not clear to us why the order purports to deny an unconditional license to applicant since, at the time of the hearing, there was no application pending for a license without conditions. Applicant had already filed a Petition for Conditional License which, until the day before the hearing, the Department was prepared to grant. The application awaiting Department action at the time of the hearing was for a license that included eight conditions, one of which placed seven restrictions on the use and physical characteristics of the private or semi-private rooms in the premises about which the ALJ had expressed concern.

Department to allow applicant to re-submit a Petition for Conditional License, which the Department shall not unreasonably reject, in accordance with the foregoing opinion.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.