

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

AB-9493

File: 47-533043 Reg: 14080733

MICHELLE DERVISS,
Appellant/Protestant

v.

MARIA DEL CARMEN ALFARO DE SAHAGUN,
dba La Hacienda Taqueria
1401 Grant Avenue, Novato CA 94945
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 7, 2016
Sacramento, CA

ISSUED MARCH 1, 2016

Appearances: *Protestant:* Michelle Derviss, in propria persona.
Respondents: Maria Del Carmen Alfaro De Sahagun, in propria
persona; Dean Leuders as counsel for the Department of Alcoholic
Beverage Control.

OPINION

Michelle Derviss (appellant/protestant) appeals from a decision of the
Department of Alcoholic Beverage Control¹ granting the application of Maria del
Carmen Alfaro de Sahagun, doing business as La Hacienda Taqueria
(respondent/applicant), for a license upgrade.

¹The decision of the Department, dated February 19, 2015, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

On November 7, 2013, Respondent-Licensee (hereinafter "La Hacienda") applied to upgrade her type 41 on-sale beer and wine public eating place license, issued in 2005, to a type 47 on-sale general public eating place license,² and to expand the licensed premises into a vacant suite next door.

Appellant Michelle Derviss owns a home within 100 feet of the licensed premises, as defined by rule 61.4. She and a second similarly situated resident³ filed protests against La Hacienda's application. Derviss complained that La Hacienda and other businesses dispose of their trash in a dumpster located very close to Derviss' bedroom window. The dumpster, according to Derviss, is often left open due to excessive garbage, thereby attracting rats, and the dumping of bottles late at night disturbs her quiet enjoyment. Additionally, Derviss wanted La Hacienda to close at 9:00 p.m.

The Department conducted an investigation and recommended that the applied-for license issue with the following conditions:

1. Sales, service, and consumption of alcoholic beverages shall be permitted between the hours of 10:00 AM and 10:00 PM each day of the week.
2. The disposal of Alcoholic Beverage containers shall not be emptied between the hours of 10:30 PM and 9:00 AM each day of the week.

²The license upgrade would allow Respondent to sell distilled spirits, in addition to the beer and wine permitted under the type 41 license. Issuance of the type 47 license would result in cancellation of the type 41 license, and therefore would not increase the number of licenses in the census tract.

³The second protestant is identified in the Report on Application for License as either Robert Chapman (see *id.* at p. 5) or Robert Champion (see *id.* at pp. 6-9). Regardless, this second protestant did not participate in the administrative hearing, nor is he participating in this appeal.

3. Entertainment provided shall not be audible beyond the inside licensed area under the control of the licensee(s).

The Department informed Derviss of its recommendation. Derviss requested a hearing to contest the recommendation.

An administrative hearing was held on January 6, 2015. At that hearing, oral and documentary evidence was presented by Lynda Parkerson, a Staff Services Manager for the Department; by Derviss; by Angel Sahagun, the son of licensee and La Hacienda owner Maria Del Carmen Alfaro De Sahagun; and by Mike Garrett, whose wife and sister-in-law own the building in which the licensed premises are located, and who is employed to monitor garbage, tenant complaints, and compliance with local ordinances.

After the hearing, the Department issued its decision which denied appellant's protest and allowed the license to issue. The decision found that it was in Derviss' interest for the license to issue, since introduced conditions not present on the previous licensed that would restrict the hours when alcohol could be served, the hours when La Hacienda could dispose of alcoholic beverage containers, and the volume of entertainment from the restaurant. The decision also noted that the location of the dumpster was beyond the Department's jurisdiction, and encouraged Derviss to contact the landlord or City of Novato officials. Finally, the decision noted that it was beyond the Department's jurisdiction to order the restaurant to close at 9:00 p.m., as Derviss requested, since the City of Novato allows it to operate until 11:00 p.m.

Derviss thereafter filed an appeal contending that La Hacienda's disposal of garbage disturbs her quiet enjoyment and does not comply with rule 61.4.

DISCUSSION

I

Derviss contends that the La Hacienda's garbage disposal arrangement disturbs her quiet enjoyment of her residential property. In particular, Derviss objects to the placement of the dumpsters near her back fence, twenty feet from her bedroom window; the audible noise from the dumping of glass bottles and cans, which she compares to a car crash; and the similarly loud removal of garbage from the dumpsters by a sanitation truck six days a week, between the hours of 5:30 and 7:30 a.m. Additionally, in her closing brief, Derviss notes that vagrants often forage through the dumpsters during the night, and that the dumpsters are poorly maintained, resulting in a strong odor and a massive rat habitat. Derviss states that she does "not wish to impede the right of La Hacienda to operate a business" and asks that the following conditions be imposed:

1. Relocate the dumpsters away from the impacted residential building by a minimum of 100 feet and install night time locks so foraging is not allowed. Maintain sanitary conditions that meet state, national and local standards.
2. The petitioner or its landlord shall construct and maintain a solid block fence not less than 6 feet tall along the back boundary of the premises parking lot
3. No early, prior to 9 AM and late night dumping of bottles, after 9 PM.
4. The windows and doors of the business shall be closed at all times except in the case of emergency.
5. There shall be no live entertainment or audible music beyond the interior of the premises
6. There shall be no advertisement of happy hour
7. Loitering is prohibited on or around these premise [*sic*]

(App.Cl.Br. at p. 5.)

The Department responds that Derviss' concerns, as articulated at the administrative hearing, were limited to garbage and the related rats. Moreover, the Department argues that it does not have the authority to order relocation of the dumpsters, and that Derviss has not shown that the applied-for license upgrade and premises expansion will add to the alleged problems.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, §§ 22; Bus. & Prof. Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Department rule 61.4 — the touchstone of Derviss' appeal — provides, 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 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. . . .

¶ . . . ¶

Notwithstanding the provisions of this rule, the department may issue an original 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.

It is undisputed that Derviss' residence is located within 100 feet of the licensed premises. (See Report on Application for License, Exhibit 2, at p. 5.)

According to the Report on Application for License (Exhibit 2), the Department initially received a total of nineteen protests, two of which were from rule 61.4 residents, including Derviss. (See *id.* at pp. 5-7.) Of the remaining seventeen protests, one was determined to be fraudulent. (*Id.* at p. 7.) Thirteen of the remaining protestants withdrew their protests based on the terms of the Petition for Conditional License. (*Ibid.*)

In the course of investigating La Hacienda's application, the Department, through Staff Services Manager Lynda Parkerson, investigated the concerns expressed by the remaining five protestants. Parkerson identified eight potential issues based on the protestants' input, and made a recommendation for Department action for each issue. Of these eight issues, five were based in part on Derviss' objections. (See Report on License Application, Exhibit 2, at pp. 7-10; see also RT at pp. 11-12.)

With regard to the first issue, the disposal of bottles late at night, Parkerson observed that "the applicant has signed conditions that will restrict the disposing of any alcoholic beverage containers between the hours of 10:30 PM and 9:00 AM every day of the week," and moreover, that "[t]he applicant cannot be held responsible for the actions of other tenants." (Report on License Application, Exhibit 2, at p. 7.)

With regard to the second issue, poor management of garbage resulting in

unsanitary conditions, Parkerson detailed her firsthand observations of the dumpsters' condition. (*Id.* at p. 8.) She noted that "the bakery located in the suite 3 doors from the applicant has been dealing with the garbage complaints from the same 100 ft. residents and is now paying additional fees to have the trash removed daily." (*Ibid.*) She also took note of Derviss' request, reiterated in this appeal, that the dumpsters be moved:

It was suggested by protestant Derviss to move the dumpsters from the back of her fence to the building side. This option was investigated by the bakery owner who was advised the Fire Marshall would not allow the dumpsters to be moved as it would clog the access road and impede emergency vehicles from entering the alley.

(*Ibid.*) Parkerson concluded that "the applicant is making efforts to keep her immediate area clean" and "[o]ther tenants in the complex are also making the effort and paying additional fees for trash removal." (*Ibid.*)

With regard to the third issue, the change in operating hours, Parkerson observed that the City of Novato allows operating hours to end at 11:00 PM without amending the conditional use permit. (*Ibid.*) Upon bringing this to the applicant's attention, the applicant "stated she did not want the neighbors to be concerned that she was intending to operate as a bar in the evenings." (*Ibid.*) Parkerson noted that the applicant had agreed to a condition limiting the hours to 10:00 p.m. (*Ibid.*) Moreover, Parkerson determined that other restaurants in a two-block area remain open until 9:30 p.m. (*Ibid.*)

With regard to the fourth issue, damage to resident's fences by employees and patrons, Parkerson wrote:

It is unfortunate anytime there is an accident that involves damage to anyone or their property, however the applicant cannot be held responsible for an accident they were not involved in. Nor can it be assumed they will be responsible for creating any damage to the fences in

the future.

(*Id.* at p. 8.)

The fifth issue — the last issue identified by Derviss in her initial protest — involved a public nuisance due to overconcentration of licenses, including the potential for more public urination, delivery trucks, and smoking by employees and patrons. Parkerson surveyed these complaints and concluded "[i]t cannot be assumed that [the] public nuisances mention [*sic*] above will be increased nor caused by [the applicant], her employees or her patrons." (*Ibid.*) More importantly, Parkerson noted that the approval of applicant's license would result in the cancellation of her previous license, resulting in no change to the number of licenses in the census tract. (*Ibid.*)

At the administrative hearing, Parkerson largely reiterated these conclusions. (RT at pp. 12-16.) Upon questioning, however, she clarified several points. With regard to the issue of garbage disposal, she noted that the licensee has no control over the placement of the dumpsters:

The landlord is in complete control of these garbage dumpsters. It is their property. It is not up to the licensee to move them. Therefore, there is no condition that this Department can place on these garbage dumpsters, because there is nothing we can do to enforce it.

(RT at p. 13.) She admitted, however, that the expansion of the licensed premises "could" possibly increase the number of liquor bottles. (RT at pp. 13-14.) Upon cross-examination by Derviss, Parkerson testified that she had spoken with both the planning department and the police department, and they were aware of the garbage situation, but that she had not spoken with public health about the issue. (RT at p. 22.)

With regard to La Hacienda's closing time, Parkerson clarified that under its original type 41 license, which contained no condition restricting operating hours, the

restaurant was free to remain open as late as its conditional use permit allowed — that is, 11:00 p.m. (RT at p. 20.)

In the decision below, the ALJ weighed Derviss' concerns and made the following determinations:

II

Under the unique facts of this case, it is in Ms. Derviss' interest for Applicant's application to be granted. The applied-for license will place restrictions on the hours when the sale, service, and consumption of alcoholic beverages may take place at Applicant's restaurant, the hours when the restaurant may dispose of its alcoholic beverage containers, and the volume of entertainment from the restaurant. If the application is denied, Applicant's restaurant will continue to hold a Type 41 license, with no conditions on the license. Denying Applicant's application would not serve any useful purpose.

III

As for Ms. Derviss' request for the dumpster to be moved, that is an issue beyond the jurisdiction of the Department and beyond the authority of Applicant. Because the dumpster is owned by the landlord of Applicant's restaurant, it is he who decides where to place it. The City of Novato, which has jurisdiction on sanitation matters, does not have any objection to the dumpster's current location. If Ms. Derviss believes the dumpster creates a health hazard for her, she needs to contact the landlord of Applicant's restaurant and/or officials of the City of Novato.

IV

Ms. Derviss' request for Applicant's restaurant to close at 9 p.m. is also an issue beyond the jurisdiction of the Department. The City of Novato, which has jurisdiction on this issue, allows Applicant's restaurant to open until 11 p.m.

(Determination of Issues II through IV.)

Derviss' appeal largely consists of a reiteration of her protests below. As the Department points out, this Board is not authorized to retry the facts of the case. We can, however, consider whether the facts support the conclusions reached, and whether the Department has acted according to law and within the scope of its

jurisdiction. We will therefore review each of Derviss' complaints, as well as the Department's response.

With regard to the late-night disposal of bottles, we note that the licensee has agreed to conditions restricting the disposal of alcoholic beverage bottles to the hours of 9:00 a.m. to 10:30 p.m. Accordingly, should Derviss produce evidence that La Hacienda in fact dumps alcoholic beverage bottles outside those hours, she could bring a charge of license violation. However, the condition does *not* restrict other businesses sharing the dumpsters; the Department does not have jurisdiction to condition the operation of businesses that do not sell alcoholic beverages, nor can it condition other alcoholic beverage licenses in the course of issuing La Hacienda's license. Simply put, the Department has done what it can, within its jurisdiction, to address this particular concern.

With regard to the location and maintenance of the dumpsters, the Department is correct that it cannot order them moved. The dumpsters are under the control of the landlord, not La Hacienda. The Department has no regulatory authority over the landlord's business operations; it cannot, by way of conditioning or denying La Hacienda's license, order the relocation of the dumpsters, require they be locked at night, or mandate the extermination of rats. Similarly, while the Department *can* place limited conditions on La Hacienda's garbage disposal methods (such as restricting the hours of alcoholic beverage bottle disposal), it cannot, for the reasons stated above, place conditions on the licenses of *other* businesses sharing the dumpsters. If the dumpsters are poorly maintained, the landlord is in the best position to demand a higher standard of cleanliness from its tenants. If the landlord's management fails to remedy the issue, the problem becomes one of public health, *not* of alcoholic beverage

licensing.⁴

With regard to operating hours, Derviss is indeed better served by the issuance of the new license, which includes a condition limiting La Hacienda's evening hours to 10:00 p.m. The original license contained no such condition — leaving only the terms of La Hacienda's conditional use permit, which allows for operation until 11:00 p.m. Thus, La Hacienda could actually have stayed open *later*, if it so desired, under its original license than it can under the applied-for license. The conditions imposed are therefore sufficient to address this issue.

With regard to damage to resident's fences, there are simply no legal grounds for imputing purely anecdotal damage to La Hacienda, or for concluding that the denial or restriction of La Hacienda's alcoholic beverage license would curtail such occurrences. In the event of further destruction of residents' fences, the proper remedy is for a court to weigh the evidence of property damage and, if appropriate, assign tort liability to the party responsible — *not* for the Department to deny or condition La Hacienda's alcoholic beverage license. Moreover, as with the maintenance of the dumpsters, the construction of a concrete barrier wall would fall to the landlord, not La Hacienda, and is therefore outside the Department's jurisdiction.

Finally, it is undisputed that La Hacienda's license upgrade will not result in an increase in the number of licenses within the census tract. Moreover, there is no evidence that issuance of the license will cause or aggravate public nuisances; indeed, the police department has no objection.

⁴In particular, we are deeply concerned by the alleged presence of a rat habitat in and around the dumpsters. Regardless, resolution of the issue falls outside our jurisdiction.

In her closing brief, Derviss makes additional specific condition requests, including a prohibition on happy hour advertising, the closure of all premises doors and all windows at all times, and further restriction on the hours of alcoholic beverage bottle disposal. With regard to most of these requests, there is simply no rational connection to Derviss' protest. How, for example, will a lack of advertising for happy hour achieve anything other than a reduction in La Hacienda's business? With regard to other requests, such as the closure of all doors and windows and a further limitation on the hours of alcoholic beverage disposal, the license conditions, as assigned, are sufficient to remedy the problem.

ORDER

The decision of the Department is affirmed.⁵

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

PETER J. RODDY, MEMBER, listened to oral argument of this case by telephone, but did not participate in this decision, because the Board did not provide sufficient advance notice to all parties of this fact pursuant to Government Code section 11123, subdivision (b)(1)(C).

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.