

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

AB-9549

File: 21-548772 Reg: 15082587

VIRGINIA BROWN, et al.,
Appellants/Protestants

v.

WINCO FOODS, LLC
dba Winco Foods
2300 Watt Avenue, Sacramento, CA 95825-0621,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 1, 2016
San Francisco, CA

Appearances: *Appellants/Protestants:* Michael Seaman and Kathleen Stricklin,
appearing in propria persona.
Respondents/Applicant: Melani Johns of Strike & Techel as
counsel for respondent Winco Foods, LLC. Heather Hoganson as
counsel for the Department of Alcoholic Beverage Control.

OPINION

Protestants Carole Harris, Michael Seaman, and Kathleen Stricklin¹ appeal from
a decision of the Department of Alcoholic Beverage Control² granting Respondent
Winco Foods, LLC a conditional off-sale license.

¹ The titular protestant, Virginia Brown, is not a party to this appeal.

² The decision of the Department, dated October 5, 2015, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

In September 2014, Respondent Winco Foods, LLC petitioned for person-to-person, premises-to-premises transfer³ of an off-sale alcoholic beverage license for premises located on Watt Avenue in the Arden-Arcade area of Sacramento County. Protests were filed by appellants and others, and an administrative hearing was held on August 18, 2015. At the hearing, oral and documentary evidence was presented concerning the application and the protests.

By agreement of the parties, the issues were limited to the following:

- a. Will issuance of the applied-for license result in or add to an undue concentration of licenses? [Citations.]
- b. Will operation of Applicant's business with the license sought be contrary to public welfare and morals because of high crime? [Citations.]
- c. Will issuance of the applied-for license interfere with the residential quiet enjoyment of nearby residents?

(Proposed Decision, Issues, at p. 2.)

At the administrative hearing held on August 18, 2015, documentary evidence was received and testimony was presented by Department Licensing Representative Manjeet McCarthy; by Mark Lavin, Senior Director of Real Estate for Respondent Winco Foods, LLC; by Charles Shelton, Security Investigator for Respondent Winco Foods, LLC; by Protestant Sarah Medal; by Protestant Michael Seaman; by Carl Dolk, testifying on behalf of Protestant Carole Harris; by Stuart Snider, testifying on behalf of Protestant Eloise Diebel; by Jacqueline Carrigan, testifying on behalf of Protestant Charles Marshall; by Nicole Rice, District Legislative Representative of the United Food

³ The previous license holder was Fresh & Easy Neighborhood Market, located at 4401 Mack Road, Sacramento, California. (Exh. 3, Report on Application for License.)

and Commercial Workers' Union, testifying on behalf of protestant Frances Marshall; by Robert Yoha, testifying on behalf of Protestant Sandra Munro;⁴ by Protestant Kathleen Stricklin; and by Charles Price, a retired Lieutenant with the Sacramento County Sheriff's Department, who was at the time of the hearing assigned to ABC-related calls and licensing investigations.⁵

Evidence established that the premises were vacant prior to Winco Foods leasing the facility, and that Winco Foods intended to open and operate a full service grocery supermarket like its other stores throughout the state. As of the hearing, the store was not yet open, but construction and remodeling was underway. Respondent is investing approximately \$22 million in the facility. Once completed, the store will have 150 to 180 employees. There are no residences within 100 feet of the premises, and there are no consideration points within 600 feet of the premises.

According to the count formula contained in Business and Professions Code section 23958.4(a)(3), two off-sale licensed businesses are permitted in the census tract where Respondent's licensed premises are located. There currently exist four businesses holding Department-issued off-sale licenses in the census tract. Respondent's license will add a fifth. There is therefore an undue concentration of licenses per section 23958.4.

The Sacramento County Sheriff's Department has law enforcement jurisdiction over the area where the premises are located. According to statistical information maintained by the Sacramento County Sheriff's Department, the census tract/reporting

⁴ Protestants Sarah Medal, Eloise Diebel, Charles Marshall, Frances Marshall, and Sandra Munro are not parties to this appeal.

⁵ The decision below refers to Charles Price as "Deputy Price." For consistency, we have employed the same title throughout this proposed decision.

district where the premises are located had a total of 314 “Part I” crimes and “Part II” arrests. The citywide average for Part I crimes and Part II arrests per census tract is 191. The census tract where the premises are located is therefore more than 120% above average and is considered to be “high crime” per section 23958.4(a)(1).

Because there is an undue concentration of off-sale licenses and high crime, the local governing body, the Sacramento County Board of Supervisors, was designated to make a determination as to public convenience or necessity, pursuant to Business and Professions Code section 23958.4(b)(2). The Board of Supervisors determined that public convenience or necessity would be served by issuance of the applied-for license. (Exh. 3.)

Appellants and other protestants expressed concern that issuance of the license would aggravate a law enforcement problem in the area—specifically, that it would result in increased criminal activity, loitering, littering, fighting, vandalism, public urination, and drunk driving. There are numerous homeless individuals who frequent the area. According to the protestants, adding another outlet for alcoholic beverages would only make things worse in the long run by interfering with the quiet enjoyment of nearby residents.

The Sacramento Sheriff’s Department initially protested the application as well. The Sheriff’s Department agreed to withdraw its protest, however, if Respondent agreed to certain conditions. (See Exh. 3.) These conditions included an hours restriction and prohibited sales of single cans of beer or small individual containers of distilled spirits and wine.

Deputy Charles Price testified that the conditions placed on the license, including an hours restriction and a prohibition on single sales of items, would serve to prevent

individuals who are homeless, derelict, or alcoholic from purchasing alcoholic beverages at the premises.

After the hearing, the Department issued its decision denying appellants' protests and allowed the license to issue with conditions. (See Exh. 3.)

On October 5, 2015, appellants filed this timely appeal. On November 16, 2015, this Board issued a billing letter to appellants quoting \$397.80 as the "total mandatory estimated cost" of the record on appeal and requesting payment of \$397.80. (Letter from John D. Ziegler, Acting Chief Counsel, to Carole Harris, et al., Nov. 16, 2015 [hereinafter "Estimated Cost Letter"].) The letter noted that if appellants wished to receive their own copy of the reporter's transcript, additional costs would apply. (*Ibid.*) Appended to the letter was a form on Department letterhead entitled "Estimated Cost and Request for Record on Appeal." (*Ibid.*)

Appellants timely remitted a payment of \$453.35 to the Department. (See email from Liliana Chavez-Cardona to Kristi Jones, Dec. 11, 2015 [noting that Department staff, by telephone, had confirmed payment].)

On January 21, 2016, Board staff received an email from Department staff indicating that although appellants had remitted \$453.35, the actual amount due was \$550.28, leaving a balance due of \$96.93. (Email from Tosha Jennings-Tamantini to John Ziegler, Jan. 21, 2016.) The email included no accounting and no explanation as to how the actual cost was calculated. (See *ibid.*) The email noted, however, that "the timeframe for balance due is at [the Board's] discretion." (*Ibid.*)

On February 18, 2016, this Board issued a second letter to appellants, stating that the Department had received appellants' payment, but that the Department had determined the actual cost of the transcripts to be \$550.28. (Letter from Sarah M.

Smith, Staff Attorney, to Protestants, Feb. 18, 2016 [hereinafter "Actual Cost Letter"].)

The letter requested the additional payment be made to the Department by February 29, 2016. (*Ibid.*)

The Department did not receive the additional payment. On March 9, 2016, this Board issued an order dismissing the appeal.

On March 16, 2016, appellants requested by telephone that their appeal be reinstated, and on March 17, 2016, this Board notified appellants by letter that, in light of the partial payment of transcript costs, the Board would reinstate the appeal provided the additional \$96.03 due was paid to the Department by March 23.

Appellants promptly remitted the remaining \$96.93. Respondents Winco Foods and the Department objected to reinstatement of the appeal. The Board therefore requested informal letter briefing from the parties on the reinstatement issue. (See letter from Sarah M. Smith, Staff Attorney, to Kirsten Techel, Heather Hoganson, Carole Harris, et al., Mar. 30, 2016.)

After due consideration, this Board reinstated the appeal, which Respondent Winco Foods asserts was improper and, accordingly, deprives this Board of jurisdiction. (Resp. Reply Br. at p. 4.)

Appellants also contend (1) there is an undue concentration of alcoholic beverage licenses in this census tract, as well as in adjacent tracts; (2) the area is high-crime, and the Sacramento County Sheriff's Department fails to maintain statistics regarding the number of alcohol-related crimes; and (3) the licensed premises will interfere with nearby residents' quiet enjoyment. The first and second issues will be addressed together. Before addressing these three substantive issues, we will dispose of Respondent's jurisdictional argument.

DISCUSSION

I. The Jurisdictional Issue

Respondent Winco Foods contends this Board lacks jurisdiction to hear this appeal because the “ex parte decision to reinstate the appeal [is] in contravention of” section 23088 of the Business and Professions Code. (Resp. Reply Br. at p. 4.)

Respondent insists “An order from the Board is final; a rehearing, reconsideration, or reinstatement is not permitted.” (*Ibid.*, paraphrasing Bus. & Prof. Code, § 23088 [prohibiting “reconsideration or rehearing,” but making no mention of reinstatement].)

Section 23088 states,

Each order of the board on appeal from a decision of the department shall be in writing and shall be filed by delivering copies to the parties personally or by mailing copies to them by certified mail. *Each such order shall become final upon being filed as provided herein, and there shall be no reconsideration or rehearing by the board.*

(Bus. & Prof. Code, § 23088, emphasis added.) There are no cases interpreting this statute.

Ordinarily, the plain language of a statute governs, but “[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute’s legislative history, appear from its provisions considered as a whole.” (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6 [59 Cal.Rptr. 609], quoting *Silver v. Brown* (1966) 63 Cal.2d 841, 845 [48 Cal.Rptr. 609].)

Case law supports the proposition that where an administrative board’s action is based on a significant error of law and is taken without the Board’s lawful authority, the action is void. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 104 [77 Cal.Rptr. 224]; *Aylward v. State Bd. of Chiropractic Examiners* (1948) 31 Cal.2d 833, 839 [192

P.2d 929]; *Cal. Teachers Assn. v. Butte Community College Dist.* (1996) 48 Cal.App.4th 1293, 1303 [56 Cal.Rptr.2d 269].)

Indeed, the California Supreme Court has stated that even where the law considers an order final, it is not binding where that order was based on a misapplication of the law:

While a board may have exhausted its power to act when it has proceeded within its powers, it cannot be said to have exhausted its power by doing an act which it had no power to do In such a case, the power to act legally has not been exercised, the doing of the void act is a nullity, and the board still has unexercised power to proceed within its jurisdiction.

(*Aylward, supra*, at p. 839, emphasis added; accord *Ferdig, supra*, at p. 108; see also *Cal. Teachers Assn., supra*, at p. 1303 [declining to apply holding of *Olive Proration Program Com. v. Agricultural Prorate Com.* (1941) 17 Cal.2d 204 [109 P.2d 918] to legally void action].)

The original order dismissing the appeal included language stating that it was final. A review of the law surrounding transcript billing for appeals before this Board, however, reveals that issuance of the dismissal order for nonpayment of a non-itemized “actual cost” quoted after appellants had timely remitted the original billed amount was an act contrary to law. The demand for additional payment was legally void, as was the order dismissing the appeal for nonpayment. Reinstatement of the appeal was therefore within the Board’s authority.

Rules 187 and 190 govern the billing of the cost of a record on appeal before this Board:

§ 187. Filing Record.

The board shall request the department to furnish appellant an itemized statement of the estimated cost of the record on appeal. Cost of the

record on appeal shall include the filing of an original and three copies of the reporter's transcript and file transcript, accompanied by the original exhibits, with the board. Such statement of costs shall also include the cost of preparing and delivering to appellant a copy of the reporter's transcript, exhibits and file transcript, should any or all be requested by appellant. Upon receipt of payment from appellant, the department shall forthwith arrange for the preparation and delivery of the record on appeal.

§ 190. Cost of Record and Payment Therefore.

The department shall calculate the cost of the record on appeal as provided by Section 187, shall notify the appellant thereof, and demand payment. Payment shall be made by appellant to the department within fifteen days after the date of issuance of such demand.

(Code Regs., tit. 4, §§ 187, 190.) Transcription fees are set forth in section 69950 of the Government Code.

The most significant difficulty in this case, however, arises from Business and Professions Code section 24310, captioned "Payments for cost of transcripts; Refund of excess fee":

(a) Any person requesting a transcript from the department in a case on appeal to the Alcoholic Beverage Control Appeals Board, shall pay the transcript cost specified in Section 69950 of the Government Code. *Any actual cost in excess thereof shall be paid by the Appeals Board from the Alcoholic Beverage Control Appeals Fund.*

(Bus. & Prof. Code, § 24310(a), emphasis added.)

The Estimated Cost Letter sent to the appellants was not itemized as required by rule 187, but nevertheless requested mandatory payment of \$397.80. Appellants timely remitted \$453.35, as required by rule 190.⁶ (See Estimated Cost Letter.) They were nevertheless billed by this Board for an additional \$96.93, based on the Department's

⁶ While it is unclear what appellants' additional payment was intended to cover, the estimated cost letter also notified the appellants that additional copies of the record or transcript would be billed according to the appended fee schedule. It is likely the additional funds were intended to purchase additional copies of one or more of these documents.

“actual cost” statement.⁷ (See Actual Cost Letter.) The “actual” cost, like the “estimated” cost, was not itemized.

Pursuant to section 24310 of the Business and Professions Code, no additional request for payment should have been made, either by this Board or by the Department. The “estimated cost” should have been itemized, and should have reflected the amount due based on the transcription fees outlined in section 69950 of the Government Code. Any difference between the estimated cost and the actual cost was to be paid out of the Alcoholic Beverage Control Appeals Fund. (Bus. & Prof. Code, § 24310(a).) The billing of appellants for the additional \$96.93 was contrary to law, and this Board’s original order dismissing their appeal for nonpayment of that amount was therefore void. Reinstatement of the appeal was proper.

Moreover, to hold to the plain language of section 23088 under these circumstances would result in an absurdity. The “estimated” and “actual” costs—neither of which were itemized—were provided by the Department, as required by law. The Department is a party to this and all other litigation before this Board. The decision to dismiss the appeal was based on longstanding—and legally erroneous—billing practices between this Board and the Department. It would be absurd and manifestly unjust to bind this Board to a legally erroneous dismissal order and, as a result,

⁷ Indeed, the email from Department staff presumes the additional cost is the appellants’ responsibility:

I spoke with Jake [Rambo] and if you could move forward on preparing the letter for the additional amount owed from appellants that will be great. Appellant’s [sic] paid \$453.35, but the actual amount due is \$550.28, which gives a balance of \$96.93. The timeframe for balance due is at your discretion.

(Email from Tosha Jennings-Tamantini to John Ziegler, Jan. 21, 2016.)

penalize appellants for the improper billing practices of an opposing party.

Pursuant to case law, this Board's March 9, 2016 dismissal order was a nullity, and the Board retained the "unexercised power to proceed within its jurisdiction." (*Aylward, supra*, at p. 839.) It was within this Board's jurisdiction to reinstate this appeal and hear the matter on the merits.

II. Issues Against Issuance of the Conditional Off-Sale License

Due to Overconcentration

First, appellants contend there is an undue concentration of licenses in the census tract in which the licensed premises are situated, and furthermore, that the adjacent census tracts are overconcentrated. Appellants direct this Board to the testimony of Carl Dolk, who stated there are eight census tracts bordering Respondent's, and that the nine tracts together have a total of 41 off-sale alcoholic beverage licenses—nearly twice the permitted number. (App.Br. at p. 1, citing RT at pp. 110-111.) Appellants also point to testimony from Michael Seaman indicating that the Arden-Arcade area of Sacramento currently has one liquor sales outlet per 1,119 residents, which is 152% the permitted number. (App.Br. at p. 2, citing RT at p. 87 and Exh. 2, at pp. 1-3.)

Second, appellants contend the census tract in which the licensed premises are situated suffers from high crime. Appellants argue there were 314 offenses in the census tract in the prior year, which exceeds the Sacramento County average by 164%. (App.Br. at p. 2, citing Exh. 2, at p. 4.) Moreover, appellants point out that the Sacramento County Sheriff's Department has failed to track the number of crimes that are alcohol-related. (App.Br. at p. 2.) According to Seaman's testimony,

The sheriff has been asked for a long time, for several years to please put

a check box on their incident reports so that then there would be the ability to track the data that links the crime with the alcohol. The sheriff has not been able to do that, whether it's a budget reason or some other reason. They've simply not done that. Other jurisdictions have done that, and because they have data that enables them to focus their law enforcement activity in a way that improves . . . the situation in the community. Sacramento County has chosen not to do that.

(RT at p. 89.) The result, according to appellants, is that residents are burdened with community-level enforcement of alcoholic beverage laws. (App.Br. at pp. 2-3.)

Moreover, there has been a significant increase in the homeless population, many of whom are self-medicating with alcohol and drugs, and are therefore unpredictable.

(App.Br. at p. 3.)

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 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 1439, 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 reasonable 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” of any application for an alcoholic beverage license, 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.”

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

(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 section 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).) This Board 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. (See *Nick* (2013) AB-9335, at pp. 2-5.)

It is undisputed that the census tract at issue contains an undue concentration of off-sale alcoholic beverage licenses under the terms of section 23958.4, subdivisions (1) and (3), due respectively to the number of licenses and the level of crime in the census tract. (See Dept. Reply Br. at p. 7 [“There was never a suggestion that the census tract where WINCO proposed to open was not designated as high crime or that there already existed more licenses (4) than permitted (2).”]; see also Resp. Reply Br. at pp. 6-7.) It is also undisputed, however, that “the Sacramento County Board of Supervisors by majority vote made a finding of public convenience and necessity in

connection with” Respondent’s application. (See generally App.Br.; see also Exh. 3, Letter from Susan Peters, Supervisor, Third District, to Department of Alcoholic Beverage Control, Mar. 30, 2015.) In a letter to the Department, Supervisor Susan Peters described her own reasoning:

My primary reasons for supporting the application (which I believe also were shared by the other members of the majority) are (1) WinCo agreed to comply with the Sacramento County Sheriff’s Department conditions and (2) WinCo’s development will contribute to the on-going efforts to help revitalize Country Club Plaza.

The decision by WinCo to open a full-service grocery store at the former Gottschalks location in Country Club Plaza represents a coming of full circle for that location since many years ago it was a Stop-N-Shop (a grocery store). Furthermore, WinCo is expected to invest \$18 million in the shopping center which will include a new front and improved landscaping. The expected increase in foot traffic should entice more tenants to the mall as well as more reinvestment in the overall vicinity. I have full faith that WinCo’s adherence to the Sheriff’s conditions provides adequate safeguards to avoid problems that can evolve from the sale of alcohol.

(Ibid.)

In the decision below, the ALJ found that,

[b]ecause there is an undue concentration of off-sale licenses due to high crime [23958.4(a)(1)] and the number of off-sale licenses [23958.3(a)(3)], the local governing body must make a determination as to whether public convenience or necessity would be served by issuance of this license as per Section 23958.4(b)(2). The Sacramento County Board of Supervisors has been designated to make the determination as to public convenience or necessity. As to this application, the Sacramento County Board of Supervisors determined that public convenience or necessity would be served by issuing this license (Exhibit 3, tab D).

(Findings of Fact, ¶ 8.) Based on these findings, the ALJ reached the following conclusions of law:

5. Section 23958.4 defines “undue concentration” of licenses. There is both a “high crime” definition contained in Section 23958.4(a)(1) and a “high count” definition pertaining to off-sale retail licenses contained in Section 23958.4(a)(3). Coming within either definition *requires* denial of

an application unless an exception exists.

6. The prohibition contained in Section 23958.4(a)(1) does apply to this application. (Findings of Fact, ¶ 7). The census tract in which the premises is located is considered to be high crime.

7. The prohibition contained in Section 23958.4(a)(3) also applies because there is an undue concentration of off-sale licenses in the census tract. (Findings of Fact, ¶ 6).

8. Notwithstanding the prohibitions cited in Sections 23958.4(a)(1) and 23958.4(a)(3), the Department is permitted to issue a Type 21 off-sale license if the local governing body makes a determination that public convenience or necessity would be served by issuance of the license as per Section 23958.4(b)(2).

9. The local governing body, Sacramento County Board of Supervisors, found that public convenience or necessity would be served by issuance of the license. (Findings of Fact, ¶ 8).

(Legal Conclusions, ¶¶ 5-9, emphasis in original.)

The ALJ correctly states the law. Given that the facts supporting his findings and conclusions are undisputed, substantial evidence supports an exception under section 23958.4(b)(2). This Board therefore reviews only for abuse of discretion, a high bar to hurdle unless appellants can show a clear error of law. While the ALJ acknowledged “[t]he protestants do not agree with that determination,” he weighed that objection against input from local law enforcement. (See Legal Conclusions, ¶¶ 9-10; see also Part II, *infra*.) Indeed, it is undisputed that the Sacramento County Sheriff’s Department withdrew its protest once Respondent agreed to the conditions listed on the license.

We sympathize with appellants’ fears, but when both the local governing body and local law enforcement agency agree that issuance of the license with conditions will not aggravate crime in the area, our authority, as a matter of law, is severely restricted when it comes to reversing their decisions. While the census tract does indeed suffer from an undue concentration of licenses as defined by section 23958(a)(1) and (3) and

is thus subject to denial, the Board of Supervisors' vote, finding that issuance of Respondent's license serves public convenience or necessity, provides an exception under section 23958.4(b)(2). Moreover, local law enforcement supports issuance of the license with conditions. It was not an abuse of discretion for the Department to rely on the judgment and expertise of local government and law enforcement and issue the conditional license.

III. Claim that Issuance of the License

Interferes with Appellants' Quiet Enjoyment

Appellants contend the addition of another off-sale licensee will infringe on their quiet enjoyment and exacerbate existing problems—including homelessness, public intoxication, and litter—in the immediate area. Appellants point to testimony from Sarah Medal, who stated public intoxication was a problem “at all hours of the day,” and that her son was not safe coming home from his middle school alone. (App.Br. at p. 3, citing RT at p. 68.) Moreover, Michael Seaman testified that the public intoxication issue has increased as additional large alcohol sales outlets have opened. (App.Br. at p. 3, citing RT at pp. 100-101.)

Additionally, appellants point out that similar conditions restricting other licenses in the census tract have done nothing to control these problems. Appellants direct this Board to testimony from Deputy Price: when asked by the ALJ, “Would another alcohol establishment just add more complexities to an already burdened department?” Deputy Price responded, “Yes. It would add another sales point for alcohol.” (App.Br. at p. 4, citing RT at p. 155.)

Besides restricting issuance of a license in areas of undue concentration, section 23958 states that the Department “shall deny an application for a license if issuance . . .

would tend to create a law enforcement problem.” (Bus. & Prof. Code, § 23958.)

Rule 61.4 further protects the quiet enjoyment of nearby residents:

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 ALJ, however, found that there were “no residents [sic] within 100 feet of the premises.” (Findings of Fact, ¶ 4.) Appellants do not dispute this finding. (See generally App.Br.) Rule 61.4 therefore does not apply.

This does not, however, dispose of the alleged increase in law enforcement problems. (See App.Br. at pp. 3-4; Bus. & Prof. Code, § 23958.) On that issue, the ALJ made the following findings of fact:

9. Protestants are concerned that the issuance of the applied for license will aggravate a law enforcement problem in the area. They believe licensure at the Proposed Premises will result in increased criminal activity, loitering, littering, fighting, vandalism, public urination, and drunk driving. There are numerous homeless individuals who frequent the area. Adding another outlet for alcoholic beverages will only make things worse in the long run by interfering with the quiet enjoyment of nearby residents.

10. The Sacramento Sheriff’s Department initially protested this application. The Sheriff’s Department agreed to withdraw its protest if the Applicant agreed to certain conditions (Exhibit 3, tab C). Those conditions included an hours restriction and prohibited sales of single cans of beer or small individual containers of distilled spirits and wine.

11. Deputy Charles Price testified that the conditions placed on this license would serve to prevent individuals who are homeless, derelict, and/or alcoholic from being able to purchase alcoholic beverages at this premises. The hours restriction and the prohibition on single sales of items will prevent these individuals from purchasing these item[s] at this location. Deputy Price opined that issuance of the conditioned license will not create the types of problems that the protestants believe will occur.

(Findings of Fact, ¶¶ 9-11.) Based on these findings, the ALJ reached the following conclusions of law:

10. The concerns of law enforcement officials carry a great deal of weight when it comes to determining what to do with these types of issues. Issuance of the license with the conditions listed on the Petition for Conditional License will not tend to create or aggravate a law enforcement problem in the area.

11. The Department believes that the conditions contained within the Petition For Conditional License will alleviate the concerns of the protestants (Exhibit 3, tab A).

12. Issuance of the license subject to the conditions would not be contrary to public welfare or morals.

(Legal Conclusions, ¶¶ 10-12.)

As described in Part II, *ante*, this Board reviews whether these findings are supported by substantial evidence.

As appellants point out, a number of protestants described extensive problems with homelessness and public intoxication in the area surrounding the proposed premises. One of the original protestants, Sarah Medal, stated,

I walk past the WinCo site every Saturday morning to the farmers [*sic*] market that happens in the WinCo parking lot. Every day on the corner I see people with open alcoholic beverages, some of the same people clearly visibly intoxicated, pan handling on the corner.

[Objection; overruled.]

THE WITNESS: It does affect my quality of life. My son doesn't come home from our middle school because he has to cross the same grouping, and he can't come by himself because it's unpredictable.

[¶ . . . ¶]

It's another retailer selling alcohol to go in our community that already has several liquor stores within walking distance. I do not believe it's going to help the quality or the health of the community by providing one more opportunity for people to buy alcohol.

(RT at pp. 68-69; see also RT at pp. 72-73 [describing locations where intoxicated individuals congregate].) Protestant Michael Seaman provided charts, including one illustrating the location of off-sale retail licensees and crimes committed in the previous 30 days. (See Exh. I; see also RT at pp. 81-83.) He further testified,

Much has been said about the value and importance and significance of the conditions that the county sheriff has arranged to have imposed on WinCo. These conditions are essentially the new standard across the unincorporated area. They're imposed on all proposed applicants.

[Objection; overruled.]

[THE WITNESS:] We know in the community that there are some serious problems. We've heard testimony about the homeless that are all around the area. You've heard that there's crime in the area. These problems exist given the County's ability to enforce its current set of conditions upon all the existing licenses.

[¶ . . . ¶]

In fact, the situation here is so difficult for the [law] enforcement staff . . . that at a meeting last spring the ABC staff and the county deputies basically told the audience "You're going to have to help us do the enforcement." The County's always telling us "If you have a problem call 311. Report it on 311." They've been training us to be their eyes and ears for enforcement. We're told at that meeting that I mentioned that we're going to have to loiter at WinCo to see if there are problems . . . They're not able to keep abreast of it all, and they rely on citizens to do the enforcement.

(RT at pp. 88-90; see also RT at p. 101 [testifying to increase in public urination and alcohol containers following opening of Walmart across the street].) Carl Dolk, testifying on behalf of appellant/protestant Carole Harris, cited a news article quoting Sacramento County Sheriff's Deputies, who stated that areas like Arden Arcade "are seeing a sharp rise in the homeless population and the problems that can come with it. . . . We're dealing with people who are going to be self-medicated either to alcohol or drugs, so we always have to be aware of that unpredictability." (RT at pp. 111-112,

quoting Exh. II, Tony Lopez, “Sacramento County Deputies Tackling Growing Homeless Problem,” *CBS13*, Mar. 3, 2015.) Robert Yoha, testifying on behalf of protestant Sandra Munro, stated that he had seen alcohol-related crimes increase in the neighborhood, and had himself suffered a home invasion in which the attacker allegedly “claimed amnesia due to drinking alcohol for three days and then doing meth to stay awake.” (RT at pp. 138-139.) Protestant/appellant Kathleen Stricklin described how an increase in public intoxication has led her family to avoid nearby parks. (RT at pp. 145-146.)

Indeed, when witness Jacqueline Carrigan, testifying on behalf of protestant Charles Marshall, offered a report suggesting a correlation between density of alcohol outlets and crime, the ALJ stopped her short: “Okay. Do you know the bottom line, though? Says an old Bob Dylan song, you don’t need to be a weatherman to know which way the wind blows. Okay? Everybody understands if you have more alcohol available it’s going to cause more problems. I understand that. Everybody does.” (RT at p. 127.)

Taken at face value, then, the evidence presented by protestants at the original hearing suggests that issuance of the license would aggravate the law enforcement issue.⁸ The ALJ, however, weighed that evidence against the opinion of law enforcement, which he afforded great weight.⁹ (Legal Conclusions, ¶ 10.) Initially, the

⁸ Many of the original protestants—including Sarah Medal, Charles Marshall, and Sandra Munro—are not parties to this appeal. Their testimony nevertheless supports appellants’ case. (See Gov. Code, § 11513(c).)

⁹ Respondent Winco Foods argues that the ALJ also weighed its contribution to improving the community. It writes: “In addition, [the ALJ] acknowledged that Respondent is taking over a previously vacant storefront and investing a significant amount of money in building out the store, landscaping the premises, and revitalizing the neighborhood.” (Resp. Reply Br. at p. 7, citing Findings of Fact, ¶¶ 3-4.) Respondent further argues that its security measures will contribute to the “overall

(cont.)

Sacramento County Sheriff's Department protested Respondent's license application, requesting imposition of conditions. (Exh. 3, Report on Application for License.) The protest was deemed withdrawn when applicant signed the Petition for Conditional License. (*Ibid.*)

Deputy Price, however, agreed that the area in question presented a law enforcement problem:

[BY MR. DOLK:] What have you noticed in the past several years as far as intoxicated individuals in the vicinity and at Country Club Plaza, Country Club Centre, that area? Have you noticed an increase, would you say, over the last five years?

A. Yes, sir.

Q. Okay. What do you typically find? Do you find the individuals passed out? Do you find them incapable of taking care of themselves or all of the above?

A. The area you're talking about is a problem child for the sheriff's department in that we get numerous complaints of homeless individuals in that area.

(RT at p. 150.) He also testified, as pointed out by appellants, that a new licensed premises would add to the Sheriff's Department's burden:

[BY MR. DOLK:] What resources is the sheriff and the County going to provide you for—I imagine you feel—do you feel like you're lacking resources?

A. The sheriff's department?

Q. Yes.

(^{9, cont.}) cleanup" of the community. (Resp. Reply Br. at p. 7.) While the ALJ recites the factual elements of this argument—that the premises were previously vacant, that construction and remodeling are underway, and that Respondent has invested \$22 million dollars in the facility—he makes no findings and reaches no conclusions that issuance of the applied-for license will in any way revitalize or improve the surrounding area. (See generally Proposed Decision.)

A. I'm sure we're lacking in resources, manpower being the key to that.

Q. Would another alcohol establishment just add more complexities to an already burdened department?

A. Yes. It would add another sales point for alcohol.

(RT at p. 155.)

The ALJ personally quizzed Deputy Price on the expected effect of the license conditions:

[ADMINISTRATIVE LAW JUDGE LEWIS:] You're aware that the sheriff's department initially objected to a license being—ABC license being issued to WinCo?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: And you're aware of the fact that the sheriff's department withdrew that objection based on the fact that some conditions were added to the proposed license?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: Are you aware of those conditions?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: Let me ask you, sir, what do you think that the proposed condition is?

THE WITNESS: I think they're good conditions. I think they were—the sheriff's department is working with ABC and with the County planning to standardize the conditions of any new establishment that's going to be doing off-sales and on-sales as well, just different conditions, so that we have standardized conditions with almost all the stores that are currently applying for a type 20 or type 21 license.

ADMINISTRATIVE LAW JUDGE LEWIS: Okay. And with these off-sales, as you've described it, 20's and 21's, first of all, the types of individuals that the sheriff's department and all the neighbors have trouble with, essentially we're talking about the less fortunate, the homeless, alcoholic or drug addict type of individual that's causing these types of problems, right?

THE WITNESS: They're a majority of them as we're seeing nowadays.

ADMINISTRATIVE LAW JUDGE LEWIS: These individuals normally don't have a whole lot of personal resources, do they?

THE WITNESS: No, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: These are the types of individuals that are not going to go into a store and buy a fifth of spirits, are they?

THE WITNESS: Not normally, no, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: They're going to be looking for the smaller items that are less costly?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: And isn't that what the conditions are supposed to address?

THE WITNESS: Yes, sir.

ADMINISTRATIVE LAW JUDGE LEWIS: And do you feel that the conditions placed on here, like, you know—they're talking about wine coolers must be bought in four-packs, that you can't buy a single. Do you feel those conditions that are in here address those types of concerns?

THE WITNESS: Yes, sir. I think they curtail the availability of the problem population we're talking about of purchasing alcohol in those establishments.

ADMINISTRATIVE LAW JUDGE LEWIS: Okay. And what about the hours restrictions, 6:00 a.m. to 10:00 p.m.? Do you feel that cutting it off at 10:00 p.m. is a help in addressing some of those concerns?

THE WITNESS: I think it's a tool that helps us address it. Yes, sir.

(RT at pp. 152-154.)

As appellants point out, there are moments in the testimony, particularly from Deputy Price, that are inconsistent with the ultimate findings. However, a review of the complete record reveals that, despite these inconsistencies, there exists substantial evidence to support the findings below.

It is true, for example, that “Deputy Price opined that issuance of the conditioned license will not create the types of problems that the protestants believe will occur,” as stated in the decision below. (Findings of Fact, ¶ 11.) At the behest of the ALJ, Price opined that the conditions were “good conditions” and standardized (RT at p. 152); that individuals with less resources would typically purchase smaller, less costly, or single items, and that the conditions would prevent those sales (RT at pp. 153-154); that the conditions “curtail the availability of the problem population we’re talking about of purchasing alcohol in those establishments” (RT at p. 154); and that the hours restriction provided “a tool that helps us address” the concerns. (*Ibid.*)

Price also testified, however, that the additional off-sale license would add to the Sheriff’s Department’s burden, as “[i]t would add another sales point for alcohol.” (RT at p. 155.) He agreed the area was a “problem child” with “numerous complaints.”¹⁰

Ultimately, the official position of law enforcement is best represented by the Sheriff’s Department’s request for conditions in its protest letter. (See Exh. 3, Letter from Scott Jones, Sheriff, to Licensing Representative Manjeet McCarthy, Sept. 15, 2014 [hereinafter “Sheriff Jones Letter”].) As noted by the Department investigator, after Respondent agreed to the conditions, the Sheriff’s Department’s protest was “deemed withdrawn.” (Exh. 3, Report on Application for License; see also Exh. 3, Sheriff Jones Letter [“The Sheriff’s Department would be willing to withdraw our protest if the following conditions were imposed.”].) While Deputy Price’s individual testimony may not unequivocally support the inference that “[i]ssuance of the license with the

¹⁰ Indeed, as noted above, the ALJ himself stated that “Everybody understands if you have more alcohol available it’s going to cause more problems. I understand that. Everybody does.” (RT at p. 127.)

conditions listed on the Petition For Conditional License will not tend to create or aggravate a law enforcement problem in the area” (Findings of Fact, ¶ 10), the Sheriff's Department's protest and subsequent withdrawal suggest that it, as an agency, was satisfied that the conditions will alleviate any potential law enforcement issues. It was not an abuse of discretion for the ALJ to assign that determination a “great deal of weight”—or rather, greater weight than the testimony of nearby residents not falling under the aegis of rule 61.4. (See Legal Conclusions, ¶ 10.) Having done so, the legal conclusion that issuance of the license would not create or aggravate a law enforcement problem in the area is supported by substantial evidence.¹¹

ORDER

The decision of the Department is affirmed.¹²

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

¹¹ As we observed at oral argument, this decision, while no doubt disappointing for appellants, should not eliminate their enthusiasm for improving their neighborhood. We encourage appellants to remain active on behalf of their community—not least through their local political processes. It is the vocal involvement of citizens like appellants that ensures licensees are held accountable and conduct their businesses in a manner that legitimately improves the surrounding neighborhood.

¹² 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.