

ISSUED MARCH 5, 1996

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

| | | |
|-------------------------------|---|---------------------------|
| SAAD HIRMEZ |) | AB-6534 |
| dba The Vintage Wine Shoppe & |) | |
| Gourmet Foods |) | File: 21-290919/20-289893 |
| 137 Lomas Santa Fe Drive |) | Reg: 94007412/94007413 |
| Solana Beach, CA 92075, |) | |
| Appellant/Applicant |) | Administrative Law Judge |
| |) | at the Dept. Hearing: |
| v. |) | Joyce A. Wharton |
| |) | |
| CAMILO AGUILAR, et al., |) | Date and Place of the |
| Respondents/Protestants |) | Appeals Board Hearing: |
| |) | January 11, 1996 |
| and |) | Los Angeles, CA |
| |) | |
| THE DEPARTMENT OF ALCOHOLIC |) | |
| BEVERAGE CONTROL, |) | |
| Respondent. |) | |
| |) | |

Saad Hirmez, doing business as The Vintage Wine Shoppe & Gourmet Foods (appellant), appealed from a decision of the Department of Alcoholic Beverage Control¹ which denied appellant's application for an off-sale general license and sustained the protests filed against the issuance of the license, upon the grounds that there was an undue concentration of licenses in the area, being contrary to the general public welfare

¹The decision of the department dated April 27, 1995 is set forth in the appendix.

and morals provisions of the California Constitution, Article XX, Section 22; Business and Professions Code §23958; and the California Code of Regulations, Title 4, §61.3.

The parties of record on appeal included Saad Hirmez, appellant, appearing through his counsel, John J. McCabe and Michael R. McCabe; John P. McCarthy, counsel for the department; protestants Camilo Aguilar, Isabella Breasted, Anthony Newton, and Olive W. Richardson, appearing through their counsel, Ralph B. Saltsman; and protestants Basil H. Bahri, Joseph A. E. Perkins, C. W. Richardson, and Robert J. Streff.

FACTS AND PROCEDURAL HISTORY

In 1993 appellant applied for an off-sale beer and wine license under a "person-to-person" transfer of a previous license at the same premises. Thereafter, in the same year, appellant applied for an off-sale general license for the premises. Protests were filed against the issuance of the licenses. The department tentatively gave its approval for the issuance of the licenses and issued interim permits allowing appellant to operate during the pendency of the investigative process.

An administrative hearing was held on January 12, 1995, concerning the protests to the issuance of the licenses, at which time oral and documentary evidence was received. Subsequent to the hearing, the department issued its decision, which determined that there was an undue concentration of licenses as determined by the California Code of Regulations, Title 4, §61.3 (rule 61.3). However, the department found that appellant proved public convenience and necessity as to the off-sale beer

and wine license (a defense or exclusion from the applicability of the rule against //

undue concentration of licenses), but not as to the off-sale general license. Appellant then filed a timely notice of appeal.

In his appeal, appellant raised the issue that findings X and IX of the department's decision were not supported by substantial evidence.

DISCUSSION

Appellant contended that findings X and XI were not supported by substantial evidence, arguing that the issuance of the off-sale beer and wine license was approved by way of the exclusion of public convenience and necessity. Therefore, the argument continues that the issuance of the off-sale general license should have been granted upon the same principles which allowed the issuance of the off-sale beer and wine license, as well as the fact that the local governing body had not found undue concentration of licenses.

"Substantial evidence," as raised by appellant in his contention, is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477, 95 L.Ed. 456, 71 S.Ct. 456, and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647).

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the appeals board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to

reasonably support the findings in dispute (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874, 197 Cal.Rptr. 925).

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It is the department, not the appeals board, which is authorized by the California Constitution to exercise its discretion whether to deny an alcoholic beverage license, if the department shall reasonably determine for "good cause" that the granting of the license would be contrary to public welfare or morals.

The court in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal. App.2d 489, 30 Cal.Rptr. 219, 222, enumerated several considerations the department may consider in determining if a license would endanger welfare or morals: "the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protest made, which primarily were directed to previously existing conditions attributed to an unlicensed premises...."

The scope of the appeals board's review is limited by the California Constitution, by statute, and by case law. In reviewing a department's decision, the appeals 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 appeals 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.²

The record shows that the department did not file a statement of issues objecting to the issuance of the licenses, but did provide testimony as to the history of the applications, and other pertinent information. The burden of the respective positions of appellant and the protestants was for each to show that issuance of the licenses were either proper or inappropriate.

Determinations of issues V and VI in the department's decision found cause to deny both licenses on the grounds that rule 61.3 applied. The rule sets forth a two-pronged formula for determining undue concentration of licenses³ which constitutes prima facie undue concentration of licenses.⁴ Additionally, determination VI found that the exclusionary finding of public convenience and necessity allowed for the issuance of the off-sale beer and wine license.⁵ Therefore, the only issue for review is the denial

²The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 84 Cal.Rptr. 113.

³Rule 61.3's two prongs involve: (1) a high crime area (crime statistics that show 20 percent higher crime over the average reporting district's statistics), and (2) the number of same type licenses to population in the specific area (census tract) are higher than a specified ratio in the county.

⁴Determination V also found that Business and Professions Code §23958 applied as forbidding undue concentration of licenses. The statute gives little criteria for determining undue concentration and there was no substantial evidence to support the applicability of the statute.

⁵Notwithstanding finding XI and determination of issues VI, the off-sale beer and wine license could not have been denied as the license was a "person to

of the off-sale general license (finding X and determination of issues V).

James Mark Sabins, a department investigator, testified that rule 61.3 applied to the issuance of the off-sale general license [R.T. 38]. Sabins testified that the two prongs were met, gave the number of the census tract, the number of allowable licenses, and the number of licenses in the census tract [R.T. 38-39]. Sabins also testified that according to the sheriff district statistics which he reviewed, the definition of "high crime" was shown to be applicable [R.T. 39]. The testimony was devoid of authentication of the population of either the county or census tract, proper documentation and expert testimony of the crimes within the area and average reporting district concerned as demanded by rule 61.3(a) (1) and (2). The opinion testimony of Sabins was hearsay and could not be a basis for a finding or its determination (See Evidence Code §1200 and Government Code §11513(c)).

CONCLUSION

The decision of the department is affirmed as to determinations of issues I, II, III, and IV, but reversed as to determinations of issues V and VI.⁶

person" transfer of an existing license (under surrender to the department) which would not increase the total of licenses in the area (census tract). This was attested to by the department's investigator in R.T. 17-18, 38.

⁶This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD