ISSUED MARCH 20, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

USG ENTERPRISES, INC. dba Fantasea Yacht Club 4215 Admiralty Way Marina del Rey, CA 90292 Appellant/Applicant, v. SANDY ABOUAF, ET AL., Respondents/Protestants, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-7117 File: 47-318285 Reg: 97038689 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

USG Enterprises, Inc., doing business as Fantasea Yacht Club (applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied its application for a person-to-person/premises-to-premises transfer of an on-sale general eating place license with conditions.

Appearances on appeal include applicant USG Enterprises, Inc., appearing through its counsel, Joshua Kaplan; protestants Sandy Abouaf, Richard Annotico, Jim Bisch, Deanne Beach, Frederick Brown, Frank Daroca, Andrea Daroca, Antonio

[1]The decision of the Department, dated May 14, 1998, is set forth in the appendix.

De La Cruz, Evelyn Frank, Robert Ginsberg, Joseph J. Greenberg, Bernard Jacobson, Joyce Jacobson, Bila Kahan, Robert A. Kaufman, Nathan Krems, Marjorie Krober, Patricia Moore, Hani Musleh, Lina Musleh, Elias Papachristos, Albert Reff, Rhoda Rich, Joel Schultz, Toby Schultz, Edward C. Sharp, Leonard Silverman, Elaine Silverman, Shelly Smolensky, Herbert Sonen, Thomas Vrebalovich, Bette Cole Wexler, and Fred Winograd, appearing through their counsel, Cary S. Reisman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Applicant applied for a person-to-person/premises-to-premises transfer of an on-sale general eating place license with conditions. Twenty-three conditions were accepted by applicant to be affixed to the license if it were to issue:[2] limiting hours of sales of alcoholic beverages on Friday and Saturdays to 12:30 a.m.; and prohibiting reduced pricing of alcoholic beverages, amplified sound in the patio area, and amusement machines or products, such as pool tables. Additionally, no amplified sound is to be audible outside the premises, and gross sales of alcoholic beverages not to exceed the gross sales of food.

Addressing the more critical issue, that of parking lot noise and congestion, the applied-for license would be encumbered further by the demand for one security

[2]The conditions are found in the decision of the Department.

guard on duty in the parking lot, with valet parking mandated,[3] with cars being brought to the westside parking area of the premises after 11:30 p.m. on weekends. The valet parking appears to provide that the cars are taken to a subterranean parking area under the Marina City Club (MCC) complexes where 200 spaces have been leased. There is a public parking area across Admiralty Way, with 150 spaces available [RT 7/24/97, 64-65]. There are approximately 40-50 parking spaces in front of the premises. Strangely absent from the conditions are conditions which address the obvious problem of patron congestion in and around the parking lot or entrance to the premises, as patrons leave the premises as a group. This is graphically set forth in the numerous protests filed with the Department which should have raised some concern over the over-broad scope of the protests.

Protests were filed and an administrative hearing was held on July 24, 25; August 8; September 12, 25, 26; October 17, 31; November 7; and December 4, 1997, and on February 2 and 13, in 1998, at which time oral and documentary evidence was received. At the hearing, testimony was presented concerning the present and proposed operations of the premises, the objections of the protestants, the situation existing at the premises, and the conditions that applicant had agreed to append to the license.

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[3]The condition concerning valet parking, appears ambiguous. Dwight Pickens, a Department investigator who was involved in the investigation of the application, stated "yes" to a question by the Department's counsel: "... Is it your understanding that the applicant will, to some degree, provide valet parking for those people that want to use its facility?" (Emphasis added.)

Protestants are residents of the MCC, a six-tower residential complex, with one of the towers (the southwest tower) in close proximity to the premises with some of the residents being within 100 feet of the proposed premises.

The premises is a free-standing and unattached building, formerly a restaurant, which is used as a banquet facility, catering to weddings, banquets, corporate events, meetings, and parties. The capacity is approximately 300 patrons. There is a full kitchen and fixed bar [Finding II].

There are large major hotels and apartment complexes north of the MCC towers, across Admiralty Way, a busy highway running past the MCC towers. On the south side of Admiralty Way, directly opposite the hotel and apartment complexes, are restaurants and a large hotel. Opposite these restaurants and hotel on the south side is a public beach [Exhibit D].

The premises is located next to the southwest tower of the MCC complex. Such complex is located beside a large grouping of yacht slips or docking facilities, estimated at 16 slip structures along the area abutting the MCC complex, with other slips in close proximity, equaling about 550 slips in the immediate area of the premises and MCC complex [Exhibits C & D]. The bay area, which includes the slips, is a large water and land complex, with many slips, hotels, and other commercial structures. The slips in this bay area are estimated to be in excess of 6,500.[4]

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[4]Exhibits 5-B and 5-H show the MCC southwest tower and the premises with its parking lot. Exhibits C and D show the many and varied complexes in the area, the premises, the MCC towers, and the large bay area with its many boat slips.

The MCC complex is situated in this heavy commercial-type complex which appears to cater to yacht enthusiasts, high class-dining facilities, other commercial establishments, and bay bathers and attendant parking and support businesses. The large bay area which houses the high-rise MCC complex, is but a part of a larger commercial development, apparently including apartment complexes, situated on about two to three peninsulas mainly surrounded by slip areas. The area is an amalgamation of water sport and yacht access living, where the usual quest for quiet enjoyment has been voluntarily compromised for the pursuit of pleasure and water amenities.

Applicant is presently licensed with an on-sale party boat license which allows for the sale and service of alcoholic beverages on at least two pleasure yachts. Access to the boats is from a stairwell on the west side (the farthest point away from the MCC complex), and rear side of the premises [Finding VIII].

Subsequent to the hearing, the Department issued its decision which determined that the protests should be sustained in part and denied in part and the application should be denied. Applicant thereafter filed a timely notice of appeal.

In its appeal, applicant raises the following issues: (1) the findings are not supported by substantial evidence; (2) the operation as it has been conducted for the previous year and a half has demonstrated that it will not interfere with quiet enjoyment as did its predecessor, the Red Onion; (3) in determining whether the operation of the business will interfere with nearby residents' quiet enjoyment of

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Copies of Exhibits C and D are set forth in the appendix.

their property, the standard to be used is not one of “zero tolerance,” but of a “reasonable person”; (4) applicant has addressed all the concerns expressed by the protestants; (5) licensing of the premises is consistent with the Los Angeles County Zoning Plan and supported by local law enforcement; and (6) this is a “competitor protest.” The issues will be addressed together, except for issue 6.

DISCUSSION

I

Applicant contends that the ALJ's findings are not supported by substantial evidence, arguing that “... most protestants admitted that they were not disturbed by the banquet facility operations.” Applicant contends it has addressed the concerns of residents and demonstrated that its operation would not disturb the residents (App.Br. at 59-60), and that the standard should not be “zero tolerance, but that of a reasonable person within the area concerned.

When, as in the present 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].) "Substantial evidence" is relevant evidence which reasonable minds would accept as 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].)

Also, as in the present matter, where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

With the rules of review of substantial evidence considered, we proceed to the broader and more fundamental issue, that of residential quiet enjoyment. The Department's Finding IV determines that there are residents located within 100 feet of the premises. The Alcoholic Beverage Control Act sets forth the proposition that the Department may make and prescribe reasonable rules as are necessary to carry out the purposes of the Act (Business and Professions Code §25750]. One of the rules promulgated by the Department is 4 California Code of Regulations, §61.4 (Rule 61.4), which reads in pertinent part:

> "No original issuance of a retail license ... shall be approved for premises at which ... the following condition[s] exist[s]: ...(a) The premises are located within 100 feet of a residence ...."

Quiet enjoyment of their property by the citizenry appears to command the focused attention of the state. The rule above quoted mandates that no license is

to be issued where a residence is located within 100 feet of the proposed licensed premises.

The United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471 [100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440, 49 L.Ed.2d 310], and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

The Board over the years has visited the extremely restrictive requirements of Rule 61.4. The Board in Davidson v. Night Town, Inc. (1992) AB-6154, stated: “In rule 61.4, the department prohibits itself, as it were, from issuing a retail license if a residence is within 100 feet of a proposed premises ....” In the case of Graham (1998) AB-6936, the Board cited many cases concerning quiet enjoyment and its supreme importance to the extent “that rule 61.4 is nearly absolute.”[5]

However, there appears to us that there is required somewhat of a balancing of residential quiet enjoyment and commercial enterprises. This appears so considering that the rule does not appear to be designed for this particular type of multifarious locations and activities, but mainly designed to protect typical residential

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[5]Citing Kassab (1997) AB-6688; Hyun v. Vanco Trading, Inc. (1997) AB-6620; Hennessey’s Tavern, Inc. (1997) AB-6605; Lopez & Moss (1996) AB-6578; Alsoul (1996) AB-6543, a matter where the Appeals Board raised the rule on its own motion; J.D.B., Inc. (1996) AB-6512; Park (1995) AB-6495; Esparza (1995) AB-6483; and Saing Investments, Inc. (1995) AB-6461.

communities' quiet enjoyment. But, here, the area is noise generating, designed for activities by being surrounded by a virtual sea of hotels, dining establishments, and boating – a "fun city."

We, therefore, view that the residents of MCC have less of an expectation of total quiet enjoyment in this highly commercial area, than a resident in a bedroom community surrounded by like-minded seekers of quiet and tranquility. As the exhibits tend to depict, these MCC residents have opted for a location that is not the typical quiet residential area, but one of day and night activity and commotion. The MCC high-rise homes are surrounded by huge boating enterprises of which applicant's yacht license and operation are but one of many, plus two major highways with apparent constant noise, and an area filled with local business enterprises, which all are a part of and create the ambiences of noise and congestion that appear to be a part of the community to which the residents of MCC have chosen to be affiliated, and be included in (this area of commotion and enterprise).

This dilemma, the mixture of homes and businesses, has recently been graphically brought to the attention of the Appeals Board, in the case of Kelly v. Il Fornaio America Corporation (1999) AB-7350. In sustaining the decision of the Department as to the granting of the license, we observed:

> "While nearby residents cannot expect total noise elimination from the parking lot, the parking and exiting of vehicles from the premises must be reasonably controlled. Under rule 61.4, residents should be able to expect reasonable solutions to a situation that could cause extreme discomfort to those residents."

The Department in that case, determined that "The critical issue to establish noninterference will be the use and control of the parking lot in the evening hours." Even with that astute observation by the Department, the Department by the crafting of

its conditions, almost totally ignored reasonable solutions to the problems the Department openly acknowledged. The Department in Il Fornaio said that: "A properly conditioned license would not interfere with the quiet enjoyment of nearby residential property..." (This could be said in the present appeal). The Il Fornaio case differs from the present appealed matter, in that the Department granted the license – without much of any protection to the residents, basically abdicating its duty to follow the Rule 61.4's implied duty to protect, within reason, the quiet enjoyment of nearby residents. The Department in that case, like the present appealed matter, almost totally ignored the reality of the problem of crowds leaving the premises in the late night and early morning hours, with no conditions in that case, or this matter, which reasonably addressed the problem. The Il Fornaio matter is presently on re-appeal (AB-7350a).

Notwithstanding the restrictive wording of the rule, the rule sets forth a procedure whereby the Department may issue a license even though the rule is applicable: "Notwithstanding the provisions of this rule, the department may issue an original retail license ... where the applicant establishes[6] that the operation of the business would not interfere with the quiet enjoyment of the [their] property by residents." What concerns the Board is that, effectively, applicant was thwarted in his opportunity to "establish " non-interference, due to a decision and a record replete with over emphasis on a less-than-direct issue.

It appears that the problem is not the proposed internal operation, that of a banquet facility (or even of a usual type restaurant if applicant changed its operation to

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[6]Webster's Third New International Dictionary, 1986, page 778, defines the word "establish," in the archaic form, as "to prove or make acceptable beyond a reasonable doubt," apparently meaning to prove.

a restaurant), but the movement of patrons from the premises to their awaiting cars.[7] A major impediment to understanding the problem is that most all the testimony confuses the yacht operation with the proposed banquet operation. Understandably, the protestants are extremely concerned that the new license operation will not create the difficulties of a prior restaurant operation [RT 10/17/97, 33-81, 124-142; 10/31/97, 8-14, 36-49; 11/7/97, 81-83, 107-112, 93], and increase the present problems caused by the yacht operation.

It appears to be highly questionable, to allow extremely voluminous testimony to show noise and congregation of patron problems associated with the yacht operation where the patrons all leaving at the same time, yet base the decision on almost non-existent complaints and evidence, of the presently applied-for operation. If the intent of the Department or the Administrative Law Judge (ALJ) was to show the obvious yacht problem as a basis for denial of the application for a license for the banquet facility, they are obviously misguided with such "guilt by association," and acted in a highly objectionable manner. We note that there are no conditions or restraints on the yacht operation. The license under consideration in this appeal concerns a banquet operation for a private group or groups. The Department, while imposing conditions if

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[7]We find Finding XVI, stating that a usual restaurant operation would be worse than the presently planned operation, an oxymoron, especially since the record shows the Administrative Law Judge, while lamenting the deluge of yacht operation complaints, allowed such voluminous misdirected emphasis away from the proposed operation's review. The proposed operation could create a scenario like the yacht operations, and a restaurant operation a different problem, yet these scenes are not uncommon and unique in the experience of the Department. As observed by the Department in Il Fornaio, supra, the problem is more often than not resolved by the proper crafting of conditions sufficient to adequately address the nearby residential problems.

the license is to issue, ignores the potential for congestion in the parking lot problem by only partially conditioning the license sufficient to resolve the problems that could be created. Since the congestion problem in the parking lot is the most important focus, the obvious lack of conditions which could speak to that problem, borders on the incredible.

Finding XIX states that “The Rule places the burden of proof upon the applicant to establish that the operation of the business would not interfere with the quiet enjoyment of the property by residents.” Determination of Issues 1 states that “The applicant failed to prove that the operation of the business would not interfere with the quiet enjoyment of the property by residents.”

The problem of noise from parking lot congestion was attempted to be shown by two videotapes as evidence supporting the protestant’s testimony of the disturbance caused by the applicant's operation, apparently the yacht operation, not the banquet facility. A close viewing clearly indicates a problem with the yacht operation, with large groups entering the parking lot area at a given time. There are clear sounds of voices, talking, laughing, singing, and shouting, as well as car doors opening and closing, car horns and car alarms sounding, and brakes and tires squealing. The videotapes appear to confirm that the noise from the premises' parking lot late at night rises above the constant ambient noise from the close highway traffic which is constantly heard during the entire video coverage. The Department states applicant did not sustain its burden to protect quiet enjoyment. Notwithstanding the usual rhetoric as to applicants requesting conditions be imposed on their licenses, the Department crafts the conditions during its

investigative process to insure that a premises, in the event the license is to be issued, will not interfere with the public welfare and morals.[8] The preamble to the conditions in the present matter, states: "Whereas, issuance of the applied-for license without the below-described conditions would interfere with the quiet enjoyment of the property by nearby residents and constitute grounds for the denial of the application ..." under the Rule. It would be assumed logically, that the conditions would be crafted in such a manner that barring other contingencies outside the conditions' scope, the license most likely would be issued. While the Department does not guarantee approval with the imposition of conditions, where as here, proper conditions would go a long way in solving the current problems, the Department seems duty bound not to act in such a manner as to foreclose applicant from those conditions that may resolve the complaints of the residents, and thus cause applicant not to be able to sustain its burden to prove the operation will not adversely affect the residents.

Where as here, the Department has allowed a hearing to be, factually speaking, out of control as to the issue of the pending application, we determine that there is no substantial evidence which would support the findings as to this application. Also, the Department by ignoring the problem of large groups leaving the premises at one time,

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[8]Dwight Pickens, the Department investigator, testified that the purpose of the conditions placed on the applied-for license was to preclude interference with residential quiet enjoyment. Therefore, it appears the Department in this matter attempted to impose conditions that would resolve the apparent parking lot congregation and resultant noise problem. As a practical matter, such crafted conditions are designed to, hopefully, overcome the burden placed on an applicant to prove its operation will not interfere with residential quiet enjoyment.

has placed applicant in an impossible position of not being able to show conditions that possibly would resolve the dilemma. It is the Department, not an applicant, which has the vast experience and expertise of which applicants must rely to be able to present a case reasonably capable of serious consideration. As here, serious consideration is almost totally smothered in a “sea” of extraneous but supposed applicable testimony.

Compounding the confusion caused by mixing the yacht problems and possible banquet problems, Findings XI and XVII state certain information concerning a prior operation called the Red Onion. The Red Onion operation, apparently at this location, and elsewhere within the Southern California basin was notoriously well-know for its objectionable operations. Although many witnesses in this matter mentioned the Red Onion, there should not be confusion about applicant being a different entity, and totally operating a different kind of business. Notwithstanding, the ALJ allowed an inordinate amount of leeway to the protestants to complain of the Red Onion operation ad nauseam. Considering the long period of time the Red Onion has been closed, the dwelling on past fears has also rendered the decision not one of a search for truth, but a focus on past fears and current fears from a source that is not directly, or closely related to the current inquiry. We also observe as we have with the yacht operation, the Red Onion had no conditions imposed by the Department in limiting its operations [RT 7/24/97, 89].

II

Applicant characterizes the protests by MCC residents as “competitor protests” because those residents have a financial interest in the banquet facility maintained by

MCC. Appellant is apparently arguing that protestants had another motive for filing their protests other than the complained-of disturbances.

The fact that protestants may have some interest in the financial success of the MCC complex banquet facility, does not necessarily mean their protests are not valid and informative for purposes of Department investigation.

The motive for a protest is of relatively little importance where upon examination, there is a valid public purpose for challenging the issuance of a license. The Department has the responsibility to investigate all phases of an application in order to protect the public welfare and morals.

However, applicant raises a valid concern where Kenneth Hicks, the MCC general manager, testified that the banquet in the MCC towers in the past has lost “big” money in its operation, in the amount of an $800,000 annual loss, such loss being borne by the MCC towers residents [RT 9/26/97, 107, 117-118, 125, 128]. Apparently, banquets are held, possibly, two or three times weekly, open for public use, and open as late as 2 a.m.

As we were obliged to observe in Il Fornaio, supra, the Department must perform its duties properly and impartially, by presenting a fair and balanced inquiry of testimony and evidence. As was absent in the Il Fornaio case, consideration by the Department, protestants, and applicant in this matter could include a reduction of the late night closing, closing of the small parking spaces in front of the premises at a reasonable time, mandatory valet services, which, possibly could reasonably insure that residential quiet enjoyment is reasonably protected. In the final analysis, it is for the Department to consider that which was ignored in the proceedings in this matter, and consider upon proper foundation, whether the license can be reasonably issued.

ORDER

The decision of the Department is reversed, and remanded to the Department for such further proceedings sufficient to allow applicant to properly attempt to sustain his burden under the rule.[9]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

DISSENT OF RAY T. BLAIR, JR., FOLLOWS

I respectfully dissent from the decision of the majority of the Board members. I would affirm the decision of the Department.

RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[9]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.