

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

MIKE WEAVER	)	AB-6635
Appellant/Protestant,	)	
	)	File: 20-301551
v.	)	Reg: 95033370
	)	
NORMAN D. YOP and	)	Administrative Law Judge
THELMA I. YOP	)	at the Dept. Hearing:
dba Corral de Tierra Exxon	)	Ronald M. Gruen
1 Corral de Tierra Road	)	
Salinas, CA 93908	)	Date and Place of the
Applicants/Respondents, and	)	Appeals Board Hearing:
	)	September 4, 1996
DEPARTMENT OF ALCOHOLIC	)	San Francisco, CA
BEVERAGE CONTROL,	)	
Respondent.	)	
_____	)	

Mike Weaver (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which overruled his protest filed in opposition to the issuance of an off-sale beer and wine license to Norman D. Yop and Thelma I. Yop, doing business as Corral de Tierra Exxon (applicants).

Appearances on appeal include applicants Norman D. Yop and Thelma I. Yop; the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M.

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<sup>1</sup>The decision of the Department dated February 1, 1996, is set forth in the appendix.

Allen; and protestant Mike Weaver.

#### FACTS AND PROCEDURAL HISTORY

Applicants filed a petition for an off-sale beer and wine license for their existing location, which is a gas station and mini-market combined. The Department and applicants agreed to 11 conditions which were to be affixed to the license if issued. Thereafter, two verified protests were filed in opposition to the issuance of the license.

The Department did not deny the applied-for license, but as protests were filed in opposition to the issuance, the matter was set for hearing and a proper notice of the hearing was given by the Department for the purpose of considering the issues raised by the protestants.

An administrative hearing was held on October 24, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was received concerning the issues raised by the protestants.

Subsequent to the hearing, the Department issued its decision which overruled the protests and granted the petition for a conditional license.

In his appeal, appellant raises the following issues: (1) the Department did not proceed as provided by law, by finding that applicants' premises conformed to the local zoning requirements, by not considering the highway traffic reports, and by ignoring Business and Professions Code §23958.4 (the statute gives to local governing bodies some control over the issuance of licenses); (2) appellant was not properly notified pursuant to the 500-foot requirement; and (3) there was an undue concentration of licenses.

## DISCUSSION

## I

Appellant contends that the Department did not proceed as provided by law, by finding that applicants' premises conformed to the local zoning requirements, by not considering the highway traffic reports, and by ignoring Business and Professions Code §23958.4 (the statute gives to local governing bodies some control over the issuance of licenses). The Department found that the premises were properly zoned (finding IX).

For a proper understanding of the law as it applies to this review, it must be understood that it is the Department which is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would not be contrary to the public welfare or morals. The Department determined in the present matter that issuance of the license would not be contrary to public welfare and morals.

In reviewing of the Department's decision, the Appeals Board's inquiry 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.<sup>2</sup>

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<sup>2</sup>The California Constitution, article XX, §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].

At the administrative hearing, the burden was on appellant to prove, by a preponderance of the evidence, that the issues raised by appellant were validly sufficient to cause the license to be denied [RT 6]. Since the Department's decision was contrary to appellant's protest issues, the Appeals Board, in its review must inquire whether there was reversible error in the findings and determinations of the decision.

#### A. ZONING ISSUE

There is no evidence in the record showing applicants' premises do not conform to the local zoning laws. The only reference to zoning is the Department's investigator's testimony that he checked on zoning with the Monterey Planning Department and ascertained the premises were in conformity with the zoning regulations [RT 21].

It is appellant's burden to show that there was an improper usage of the premises in violation of the local zoning laws. Appellant failed to carry that burden.

#### B. TRAFFIC ISSUE

Appellant testified that he obtained traffic statistics from CalTrans, and the record shows that the Administrative Law Judge (ALJ) admitted the statistics as administrative hearsay as no proper foundation had been laid for the statistics' admission into evidence [exhibits IV and V]. Appellant also testified as to his concern for the traffic at the intersection near the premises [RT 93-94]. None of the statistics or testimony has any real impact on the issuance of the license as there was no nexus or connection shown between the license and whether that license would adversely impact the traffic. Appellant failed to carry that burden, as well.

### C. LOCAL CONTROL

Appellant argues that Business and Professions Code §23958.4 gives local governing boards input into the licensing process.

The statute primarily tries to define "undue concentration" by eliminating the California Code of Regulations, Title IV, §61.3's two-pronged burden: high crime ratios and population ratios. Under the statute (§23958.4) raised by appellant in his argument "undue concentration" exists when either one of these two prongs is satisfied. Essentially, if the Department determines after a full investigation that crime or population ratios are sufficiently high to demand that the issuance of a license is contrary to public welfare and morals, the license may still be issued if the local governing board determines that issuance of the license would enhance "public convenience or necessity." At that point, the Department may grant the license.

However, the statute does not aid appellant in the present matter. The statute only allows local governing boards to override a denial of the application if the local board finds that issuance of the license would aid public convenience or necessity. In the present matter, the Department granted the license, so the local board issue is moot.

## II

Appellant contends that he was not properly notified under the 500-foot requirement. The Department found that the proper notification had been given to all persons, in accordance with the law (finding X).

Business and Professions Code §23985.5, the statute which governs the

requirements of notice states: "Notwithstanding any other provisions of this article, in any instance affecting the issuance of any retail license at a premises which is not currently licensed or for a different retail license, the department shall require that the applicant mail notification of the application to every resident of real property within a 500-foot radius of the premises for which the license is to be issued. The applicant shall submit proof of compliance to the department prior to license approval."

Appellant argued that the measurement should have been from property line to property line, and that appellant therefore did not receive notice, as the Department investigator measured from structure to structure, which excluded appellant from the 500-foot rule [RT 54].

The Department's Instructions, Interpretations and Procedures manual, page L180.1, sets forth the guidelines for its area offices in their duties of investigating applications for license: "Measurement of the 500 feet is to be airline, building to building, nearest point to nearest point...."

Appellant submitted no valid evidence that any of the residents within 500 feet of the premises were not notified. Additionally, appellant did not show any prejudice even if it were shown that he was entitled to notice. Appellant filed a protest and was present at the hearing and gave testimony concerning his cause. If there was any prejudice to appellant in not receiving the notice, it was not demonstrated here.

Technically, as we read the statute, the notice must be given and then a declaration filed with the Department attesting to the addresses to which the notices were mailed. Such a declaration was not placed into evidence, and that declaration

would be the only valid evidence of any failure to properly mail the notices.

### III

Appellant contends that there was an undue concentration of licenses.

Business and Professions Code §23958 provides in pertinent part: "Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license...(¶) The department further shall deny an application for a license if issuance of that license would...result in or add to an undue concentration of licenses, except as provided in Section 23958.4."

While the Department may deny a license where there is an undue concentration of licenses, §23958 does not define the term "undue concentration" of licenses. Business and Professions Code §23958.4 defines "undue concentration" of licenses according to a showing of either "licenses-to-population ratios" or "high crime-ratios." Such statistics were not entered into evidence and are not part of the record.

California Code of Regulations, Title IV, §61.3 defines "undue concentration" of licenses in regards to two factors: "high crime-ratios" and "licenses-to-population ratios." However, the statistics necessary to prove §61.3 were not entered into evidence and are not part of the record.

Appellant testified concerning a 15.68 mile highway from Salinas to Monterey, and the many licenses along that highway [RT 62-69]. The scope of that reference is outside the concept of "undue concentration," which considers only a reasonable area around the premises.

There is no evidence in the record to demonstrate "undue concentration," or how any licenses could reach on the question of "too many" licenses. There is an off-sale small grocery store which is licensed, located about 350 feet from the premises [RT 16, 30, and exhibit 2]. There are no other licenses within 1,000 feet of the premises.

We determine that the findings are supported by the record and therefore support the decision of the Department.

CONCLUSION

The Decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>This 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.



DISSENT OF JOHN B. TSU FOLLOWS

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DISSENT

I respectfully dissent. I feel that, while the evidence was weak, it was sufficient to find that the issuance of the license would adversely impact the immediate area around the premises. I believe the Department should have exercised its discretion against the issuance of the license to protect what I believe was shown to be a poorly situated distribution point for alcoholic beverages, in an area fraught with already existing dangers from traffic and congestion.

JOHN B. TSU, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD