

ISSUED MARCH 27, 1998

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

BEVERLY WILSHIRE HOMES	)	AB-6881
ASSOCIATION,	)	
Appellant/Protestant,	)	
	)	File: 47-312767
v.	)	Reg.: 96037795
	)	
BARNABY'S RESTAURANT, INC.,	)	Administrative Law Judge
dba Barnaby's	)	at the Dept. Hearing:
431 South Fairfax Avenue	)	Ronald M. Gruen
Los Angeles, California 90036,	)	
Respondent/Applicant,	)	Date and Place of the
	)	Appeals Board Hearing:
and	)	February 4, 1998
	)	Los Angeles, CA
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	
Respondent.	)	
_____	)	

Beverly Wilshire Homes Association (protestant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which denied its protest against the issuance of a general public eating place license to respondent Barnaby's Restaurant, Inc.

Appearances on appeal include respondent Barnaby's Restaurant, Inc., appearing

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<sup>1</sup> The decision of the Department dated May 22, 1997, is set forth in the appendix.

through its representative, Elliott Gottfurcht; the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley; and appellant Beverly Wilshire Home Association appearing through its counsel, Hymen L. Epstein.

#### FACTS AND PROCEDURAL HISTORY

Applicant Barnaby's Restaurant, Inc., applied for, and, following the denial of appellant/protestant Beverly Wilshire Homes Association's protest on July 7, 1997, was issued an on-sale general public eating place license. Appellant/protestant's protest was the subject of an administrative hearing conducted on January 10, 1997, at which the following grounds of protest were considered: (1) the normal operation of the proposed premises would interfere with the functions of a school, a hospital, and a synagogue located within 600 feet or in the immediate vicinity of the premises; (2) issuance of the license would be in violation of Department Rule 61.4 (4 Cal.Code Regs. §61.4) in that residences are located within 100 feet of the proposed premises; (3) normal operation of the proposed premises will interfere with the quiet enjoyment of nearby residents; (4) applicant does not intend to operate the premises as a bona fide public eating place; (5) normal operation of the premises will create traffic, parking, and loitering problems; (6) no conditional use permit has been issued; and (7) issuance of the license would be contrary to public welfare and morals.

Following an extensive hearing at which eight witnesses testified and a number of documentary exhibits were placed in evidence, the Administrative Law Judge (ALJ)

overruled each of the grounds of the protest.<sup>2</sup>

Appellant filed a timely appeal from the denial of its protest, but has not filed a brief.

Written notice of the opportunity to file briefs in support of the appellant's position was given on December 9, 1997. No brief has been filed by appellant. We have reviewed the notice of appeal and have found insufficient assistance in that document which would aid in review.

The Appeals Board is not required to make an independent search of the record for error not pointed out by appellant. It was the duty of appellant to show to the Appeals Board that the claimed error existed. Without such assistance by appellant, the Appeals Board may deem the general contentions waived or abandoned. (Horowitz v. Noble (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and Sutter v. Gamel (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].)

The objections raised by the protestants were fully addressed at the

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<sup>2</sup> A hearing was conducted on April 17, 1997, to consider a motion filed by protestants seeking the disqualification of the ALJ on the ground he had been the recipient of an ex parte communication from a Department employee regarding a phone call from a representative of the mayor of Los Angeles expressing the mayor's desire that the license be issued. Evidence was taken, following which the motion was denied. The evidence established that the ALJ had already made his decision overruling the protests and had submitted it to the Department to be typed prior to his receipt of the ex parte communication. Although appellant has also raised this as an issue in its notice of appeal, there is nothing in the record that has persuaded us that any reason exists to reject the ALJ's determination that he had not been influenced in any manner by the ex parte communication.

administrative hearing. The proposed restaurant is located on Fairfax Avenue, so it is very unlikely that it will generate a noticeable volume of additional traffic despite its projected size. The license has had imposed upon it a large number of conditions (23) intended to address possible problems, and the record shows that the applicant has taken numerous other steps to ensure that his operation remains welcome in the area.

We have not been made aware of any reason why the decision of the Department should not be affirmed.

#### CONCLUSION

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

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

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<sup>3</sup>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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.