

ISSUED MAY 8, 1998

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

Ronald E. Clarke,	)	AB-6904
Appellant/Protestant,)	
	)	File: 20-321850
v.	)	Reg: 97038842
)	
THE SOUTHLAND CORPORATION	)	Administrative Law Judge
and JESSE L. GRIGSON	)	at the Dept. Hearing:
dba 7-11	)	John P. McCarthy
41901 Big Bear Boulevard)	
Big Bear Lake, California 92315,	)	Date and Place of the
Respondents/Applicants,	)	Appeals Board Hearing:
	)	February 4, 1998
and	)	Los Angeles, CA
)	
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL)	
Respondent.)	

Ronald E. Clarke (protestant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied his protest against the issuance of an off-sale beer and wine license to The Southland Corporation and Jesse L. Grigson.

Appearances on appeal include appellant/protestant Ronald E. Clarke, appearing through his counsel, Darrell K. Moore; The Southland Corporation and

¹The decision of the Department, dated June 5, 1997, is set forth in the appendix.

Jesse L. Grigson, appearing through their counsel, M.R. Ward; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Applicants filed an application for the issuance of a type 20, off-sale beer and wine license, for premises located in Big Bear Lake, California, a popular Southern California skiing and summer vacation area. The Department proposed to issue the license, with a number of conditions imposed upon it, and appellant Clarke and two others filed protests against its issuance. Only Clarke has pursued his protest in this appeal.

An administrative hearing was held on March 28, 1997, in the course of which oral and documentary evidence was introduced with respect to the issue as defined by the Administrative Law Judge (ALJ), which was whether issuance of the applied-for license would be contrary to public welfare and morals as set forth in article XX, §22, of the California Constitution and Business and Professions Code §23958 because (1) issuance would result in or add to an undue concentration of licenses pursuant to Business and Professions Code §23958.4; (2) issuance would result in too many licenses to sell alcoholic beverages in Big Bear; and (3) issuance would interfere with the normal operation of a nearby church.

Department investigator Michael Sena conducted the investigation into the application. The applicants propose to operate a 7-11 mini-mart, which will also sell gasoline, to be located on what is presently a vacant lot located at the intersection of Big Bear Boulevard and Summit Boulevard, in the center of the community of Big Bear.

Because appellant believed the issuance of an additional license would contribute to an existing undue concentration of licenses within the census tract area, he sought and was furnished a determination of public convenience and necessity by the City of Big Bear Lake Planning Department, set forth in a letter dated April 19, 1996 (Exhibit 4), which was received in evidence without objection [RT 18].

Sena also testified that he contacted a representative of the church which was located within 600 feet of the proposed location, but did not receive any objections from anyone on behalf of the church. He also testified regarding contacts with representatives of the Sheriff's department, who told him and confirmed in a letter that they did not believe issuance of the license would present a law enforcement problem, especially since the proposed location is across the street from the sheriff's station.

Based upon his findings, Sena testified, he recommended approval based upon the petition for a conditional license.

In response to a question from the ALJ, Sena explained that the census tract figures which allowed five licenses included only permanent year-round residents, and did not take into account the visitors to the area. Sena said the area drew a large number of visitors on a year-round basis, since it is a mountain lake area with watercraft sports, fishing and sailing in the summer, and skiing in the winter.

Ronald Clarke, who was not represented by counsel at the administrative hearing, testified in support of his protest. The thrust of his testimony was that there were too many licenses outstanding in relation to the number of permanent

residents of the area. He objected to consideration of the visitors to the area because that could change depending upon weather and other conditions. Clarke acknowledged that he owned a Shell mini-mart, a potential competitor of the 7-11 mini-mart proposed by the applicants.

Donald Wintz, real estate manager for The Southland Corporation, testified in support of the application. He described the business which would be operated at the site, and said that, but for the visitors who come to the area, Southland would not have initiated the project.

Robert P. Pratte, the owner of the underlying real estate, testified regarding estimates by various governmental agencies about the number of visitors to the area on an annual basis.

Finally, John Voss, a Big Bear business owner, testified that in his opinion an additional beer and wine license would not be detrimental to the community.

Following the conclusion of the hearing, the ALJ issued a proposed decision, which the Department adopted, approving the issuance of the license.

Protestant Clarke filed a timely notice of appeal, and in his appeal raises the following contentions: (1) There is no factual basis for the finding regarding public convenience and necessity; (2) the letter purporting to be the certificate of convenience and necessity is ineffective; and (3) the statute which permits the Department to consider a certificate of convenience and necessity is unconstitutional. Issues 1 and 2 will be addressed together.

DISCUSSION

Protestant Clarke contends there is no factual basis for the finding regarding public convenience and necessity, arguing that the identical goods and services which would be provided by the applicants are already being provided to the community by his own business.

The problem with this complaint is that it is misdirected. The City of Big Bear made the determination that public convenience and necessity would be served by the addition of another mini-mart/service station. The Department is not obligated to look behind the city's determination to issue the certificate.

Protestant also contends that the letter upon which the Department relied as being the certificate of convenience and necessity is ineffective, since there is no evidence in the record that the planning department of the city had been designated by the city counsel as the appropriate body to issue such a certificate.

The letter in question (Exhibit 4) was received in evidence at the administrative hearing without objection, and there was no contention at the hearing that the letter lacked the requisite authority. However, the question whether the issue was timely raised has been rendered moot by the Department's submission to this Board, with its brief, of a certified copy of a letter to the Department of Alcoholic Beverage Control from the City of Big Bear Lake Planning Department confirming that it is the agency which provides the written response "determining whether or not public convenience and necessity is met for applications submitted for a license within our corporate boundary."

Although the letter accompanying the Department's brief is not part of the record, we believe it is only fair that the Board consider it in light of the newly-

raised contention on appeal regarding the authority of the planning department. It is in the nature of evidence which was not reasonably available at the hearing, since the Department had no notice that there was any question regarding the letter upon which it initially relied.

It may also be noted that as the proponent of the contention that the planning department is not the designated agency for the issuance of certificates of public convenience and necessity, the burden of proof on that issue rests on protestant, who has offered no evidence to support his position.

II

Protestant contends that Business and Professions Code §23958.4 is unconstitutional, because it unlawfully delegates to cities powers that may only be exercised by the Department.

Article 1, §3.5, of the California Constitution prohibits an administrative agency from declaring a statute unconstitutional or refusing to enforce it on such grounds unless an appellate court has previously held the statute unconstitutional. Since we are unaware of any court decision to that effect, we decline to consider this issue.

III

The Department's decision carefully reviewed the evidence and the issues raised. The ALJ correctly discerned protestant's objections as founded on competitive considerations, which, albeit legitimate, are not of such weight that issuance of the license would be contrary to public welfare and morals.

As stated by the court in Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], quoting Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489 [30 Cal.Rptr. 219]:

“[T]he department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. . . . Where the decision is the subject of a choice within reason, the Department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals board or the court may not interfere therewith. [Citations.] Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises.

CONCLUSION

The decision of the Department is affirmed.²

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

²This 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.