ISSUED JULY 14, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

JAMES LISSNER Appellant/Protestant, V. SGMM, Inc., dba Seafood Grotto 117 Pier Avenue Hermosa Beach, CA 90254, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7452 File: 41-346240 Reg: 99045892 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

James Lissner (protestant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which did not sustain his protest to the issuance of an on-sale beer and wine public eating place license to SGMM, Inc. (applicant).

Appearances on appeal include appellant/protestant James Lissner; applicant SGMM, Inc., appearing through its vice-president Donald Gnanakone; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon

[1]The decision of the Department, dated July 15, 1999, is set forth in the appendix.

E. Logan.

FACTS AND PROCEDURAL HISTORY

Applicant filed its application for the issuance of an on-sale beer and wine public eating place license on September 2, 1998. Protestant filed with the Department on September 18, 1998, a protest against the issuance of the applied-for license. An interim license was granted pending the outcome of the proceedings before the Department and any appellate review [RT 29].

An administrative hearing was held on May 13, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the protest should not be sustained.

Appellant thereafter filed a timely notice of appeal. In his appeal, protestant raised the following issues: (1) the findings citing public convenience or necessity are vague, and not supported by the record thus not allowing for any standard which the parties could address; (2) Determination of Issues II that protestant did not sustain his burden to show an abuse of the Department's discretion in approving the granting of license, is an error of law; and (3) the Department's decision is not supported by its Determination of Issues or its Findings, which are not supported by substantial evidence.

DISCUSSION

I

Protestant contends the Finding citing public convenience or necessity is

vague (Finding IV), and not supported by the record, thus not allowing for any standard which the parties could address.

The Department appears to have no objective criteria concerning the term "public convenience or necessity." As set forth in the case of Burgreen v. C.B. & D.M. Entertainment, Inc. (1994) AB-6375, the Department's investigator's testimony stated:

> "... [w]e have a whole manual that tells us how to do almost everything, but public convenience and necessity of itself is a bit subjective because it changes according to the society's dictates ... Sometimes public convenience and necessity is served – mostly is served where there's a huge influx of people for food and beverages ...."[2]

As we observed in the case of Vogl v. Bowler (1997) AB-6753:

> "... While a 'definitive' definition of 'public convenience or necessity' might be helpful in some instances, a lack of one does not make the Department's decision arbitrary or capricious, as long as it is one within reason. The fact that it 'does not meet the standards the protestants [in that case] would choose' ... does not mean that there are 'no standards susceptible of meaningful review for invoking the exception.' The standard to which the Department must adhere is 'the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject."

The ALJ found public convenience and necessity upon the basis that the "restaurant [applicant's] is located in a popular, well traveled, touristy section of

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[2]A footnote in the decision stated that there were only 933 residents within the census tract, but thousands of workers come daily into that area. The Burgreen case was the "flip side" of the present matter, in that the Department had stated in its decision that the applicant had failed to prove public convenience, etc., to which this Board reversed the decision as it concluded that with no criteria to address, any applicant would have to "divine" what evidence would be necessary to prove such a nebulous standard.

Hermosa Beach. It is near the beach, pier, and other attractions ... it has many repeat customers and is full on weekends. Many of applicant's customers would like a glass of wine with their meals." (Finding II.)

Finding II states the restaurant is in a popular beach community where the premises are busy, and a glass of wine or beer would be a convenience to the diners. It appears from a reading of the record in this matter, and the many matters which have been before the Board concerning this area, that the area as a whole is a magnet for day and evening revelers and will add to the expansive growth of the immediate beach area.

This then comes within the criteria of whether such Finding is reasonable. The Department has the discretion to determine if there is public convenience and if supported with sufficient evidence, the exercise of that discretion is not arbitrary and abusive.

II

Protestant contends Determination of Issues II is erroneous, as the determination stated that protestant did not sustain his burden to show an abuse of the Department's discretion in approving the granting of license.

Protestant filed a protest with the Department stating seven grounds for objection to the issuance of the license: (1) over-concentration of licenses (undue concentration); (2) the premises is adjacent to nearby residents; (3) the Department Rule 61.4 prohibits the issuance of the license; (4) issuance would create or add to

a law enforcement problem; (5) the premises is within the immediate vicinity of religious and school facilities; (6) issuance would create a nuisance; and (7) the premises is located near recreational facilities and would create unruly and dangerous activities. The ALJ stated that he had read the seven lengthy protest issues [RT 7].

The only burden on protestant was to prove by a preponderance of the evidence the issues of his protest, which from a reading of the record, protestant did not prove. Protestant attempted to show that there were many other licenses in the immediate area which sold seafood. In this approach, protestant was in error in an understanding of what constitutes public convenience or necessity. It would appear from the record that protestant believes that if there is another or other restaurants selling seafood, then the present applied-for restaurant does not come within public convenience or necessity. This is not the case.

Where the Department finds there is "public convenience or necessity," and the Board considers the finding of the Department's discretion within the bounds of reason, then the discretion of the Department should be upheld, as the Board stated in the case of Lissner v. JTH Enterprises, Inc. (1998) AB-6845:

> "While it is true that the Department has not set standards regarding public convenience or necessity in a regulation, the court in Separtis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], while recognizing this lack, found a definition unnecessary in light of the discretion accorded to the Department in deciding whether or not issuance of a license would be contrary to public welfare or morals ...."

The Board concludes the Department acted within reason, and this portion of

the decision should be affirmed.

III

Protestant contends the Department's decision is not supported by its Determination of Issues or its Findings, which are not supported by substantial evidence.[3]

Protestant cites Government Code §11518 for the proposition that findings of fact and determination of issues must appear in the written decision. While the citation is incorrect as the statute has been amended, the appropriate statute is now Government Code §11425.50, a copy which is set forth in the appendix. Government Code §11425.50 essentially states the decision must contain a factual and legal basis for the decision.

The cases of Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board & Hutchins (1981) 122 Cal.App.3d 549, 555, [175 Cal.Rptr. 342], and Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836], both hold that the findings are important in that they expose the agency's mode of analysis to a reviewing court. While the decision is extremely sparse in its explanation of the reasons that support the decision, we cannot say with the record before us, that

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[3]For a discussion addressing the difficulty in deciding whether a portion of a factfinder's decision should be classified as a finding of fact or a conclusion of law (determination of issues), see DeArmond v. Southern Pacific Company (1967) 253 Cal.App.2d 648 [61 Cal.Rptr. 844, 851. See also 7 Witkin, California Procedure, 3rd edition, pp. 390-393.

the decision is so sparse in reasoning that it is defective.[4]

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]Footnote 14 appearing in the case of Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506 [113 Cal.Rptr 836], a case cited by this Board often for the proposition that the decisions of the Department are many times very inadequately reasoned, says, citing Mr. Justice Cardoza: "We must know what [an administrative] decision means ... before the duty becomes ours to say whether it is right or wrong."

[5]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.