ISSUED NOVEMBER 20, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THOMAS CAMPBELL-REED dba Some Place Else 1795 Geary Blvd. San Francisco, CA 94115, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7490 File: 42-319741 Reg: 99046623 Administrative Law Judge at the Dept. Hearing: Stewart A. Judson Date and Place of the Appeals Board Hearing: September 22, 2000 San Francisco, CA

Thomas Campbell-Reed, doing business as Some Place Else (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which denied his petition to remove a condition from his on-sale beer and wine public premises license, such removal being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (a), as provided for in Business and Professions Code §§23800-23801.

[1]The decision of the Department, dated August 26, 1999, is set forth in the appendix.

Appearances on appeal include appellant Thomas Campbell-Reed, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued in approximately June, 1996. During the pendency of the investigation of the premises as to licensing, appellant signed a Petition For Conditional License which set forth in its preamble the allegations that there were residents within 100 feet of the premises and that issuance of the license without the conditions would interfere with residential quiet enjoyment pursuant to 4 California Code of Regulations, §61.4; that the area has an undue concentration of licenses; and the premises is in a high crime area. The condition concerned in this appeal states: "There shall be no live entertainment or dancing permitted on the premises at any time."

Thereafter, appellant requested that the condition be removed from the license. Appellant desires to be able to provide live entertainment in the form of jazz music. Appellant alleges that his area is a part of the Jazz Preservation District, which is designed to revive a "thriving jazz club scene on Fillmore Street." [Determination of Issues I.]

The Department on June 1, 1999, denied the request, and the matter was set for hearing before the Department on July 23, 1999. Subsequent to the hearing, the Department issued its decision which denied the petition to remove the condition.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the issue that there was insufficient substantial evidence to support the findings and the determination of issues.

DISCUSSION

Appellant contends that the findings are not supported by substantial evidence, arguing that no high crime was properly proven; there were not adverse police reports of record; the testimony of the witnesses was unreliable; and valid evidence was improperly excluded at the hearing.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the 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. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a 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.

[2]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].

456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant 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].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

It appears to us that the Department would have denied the issuance of the original license but for the conditions imposed on the license. The thrust of the conditions appears to be the potential for live entertainment or dancing at the premises to be a disturbance to residential quiet enjoyment. The basis of high crime could have some casual connection to residential quiet enjoyment, possibly based on the factors of noise creating irate home dwellers who complain and these complaints take up valued police time.

The Department's investigator testified that there were still 176 residents located within 100 feet of premises, the area is still one of high crime, and there is still an undue concentration of licenses [RT 14, 17-18].

Addressing the question of residential quiet enjoyment, 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].

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857], the Supreme Court said "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the opinions of experts." Although the case was not a rule 61.4 case (the closest residence was about 150 feet away), the Kirby court upheld the Department's determination that issuance of the license sought therein would, inter alia, interfere with nearby residential quiet enjoyment even though no nearby resident had voiced opposition to the license. The court took note of substantial evidence on both sides of the issue and concluded that the expert witness testimony of the county sheriff was sufficient to support the Department's crucial findings.

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 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 ...."

The Board in Ahn v. Notricia (1993) AB-6281, stated: "This rule [Rule 61.4] concerns prospective interference or noninterference with nearby residents' quiet enjoyment of their property ... Apparently rule 61.4 is based on an implied presumption that a retail alcohol operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment."

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."[3]

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[3]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

Appellant next argues that the testimony of the protestants was unreliable. Apparently, the ALJ believed their testimony [Finding VI]. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

The Business and Professions Code section that controls this proceeding, is §23803, which states:

> "The Department, upon its own motion or upon the petition of a licensee ... if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification, provided that written notice is given to the local governing body of the area in which the premises are located. ...."

The local governing body, the Board of Supervisors of the City and County of San Francisco, adopted a resolution that the request to remove or modify the conditions on appellant's license, be denied.

The issue is whether the circumstances which gave rise to the imposition of the conditions no longer are in existence. Since the circumstances are still in existence, and the local governing body does not want the conditions removed, appellant has failed in his proof. The testimony of the witnesses against the removal of the conditions, was that the noise of the playing of jazz music during the late night and early morning hours, disturbed their sleep [RT 30, 37-38]. It is

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own motion; J.D.B., Inc. (1996) AB-6512; Park (1995) AB-6495; Esparza (1995) AB-6483; and Saing Investments, Inc. (1995) AB-6461.

noted that this music was played in direct violation of the conditions, and appellant suffered a 40/20-day suspension due to this violation.

ORDER

The decision of the Department is affirmed.[4]

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

[4]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.