

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

AB-7628

WIN RIVER MINI MART CORPORATION dba Win River Mini Mart
2415 South Bonnyview Road, Redding, CA 96001,
Appellant/Applicant

v.

Dennis J. McGowan, pastor
Bonnyview Baptist Church
Respondent/Protestant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-356379 Reg: 99047595

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: February 15, 2001
San Francisco, CA

ISSUED MAY 30, 2001

Win River Mini Mart Corporation, doing business as Win River Mini Mart (applicant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which sustained the protest filed opposing the issuance of an off-sale beer and wine license to applicant.

Appearances on appeal include applicant Win River Mini Mart Corporation, appearing through its counsel, David J. Rapport and J. Daniel Davis, the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka, and

¹The decision of the Department, dated March 30, 2000, is set forth in the appendix.

protestant Dennis J. McGowan, pastor of the Bonnyview Baptist Church.

FACTS AND PROCEDURAL HISTORY

Applicant applied for an off-sale beer and wine license on July 3, 1999.

Thereafter, a protest against the issuance of the license was filed by Dennis J. McGowan, pastor of the Bonnyview Baptist Church.

The general area could be described as rural (Exhibits C-1, C-2, and F). The premises is located on the south side of a heavily traveled highway.

The Baptist Church is located on the north side of the highway, across the highway, apparently westward, and approximately 460 feet from the boundary line of the proposed premises. Pastor McGowan and other members of the congregation are concerned with transients, some of whom may come from the trains passing in close proximity to the premises and the church. Sometimes, people, apparently transients, on foot or in vehicles, appear at the church buildings, sleep near the buildings, and are of concern to the members of the congregation. Protestants raised issues concerning the premises:

- “1. The proposed premises are located less than 450 feet from a church. Sale of alcoholic beverages in such proximity to a church is in conflict with the teachings of the church.
- 2. Consumption of alcohol by drivers and transients would increase and constitute a danger to members of the church and their activities.
- 3. Transients, who get off trains at a railroad track close to the proposed premises, will create or aggravate a public nuisance.”

Norman Pearson of the Department recommended denial of the application for the license upon the grounds of transients' use of alcohol and the resulting accumulation of trash [RT 11, 40-41]. The Department denied the license application by its issuance of a Statement of Issues on or about October 21, 1999. The issues

contained in the Statement of Issues are:

"The proposed premises is located in the immediate vicinity of a church and the normal operation of the proposed (premises)(license) would interfere with the church.

a) Bonneyview (sic) Baptist Church is located at 2570 S. Bonneyview (sic) which is approximately 543 feet walking distance from the front of the proposed premises.

b) The following activities occur at said church. [Church services and activities with the type, days and hours is set forth]."

An administrative hearing was held on February 1, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the proposed premises, the church, and the transient problem in the area.

Jack Reiser, president of Redding Oil Company testified that in 1999, the company graded an area generally across from applicant's premises, but on the north side of the highway, within close proximity to the church. In so grading the area planned for a "key lock" automated gasoline station for large trucks, mattresses, blankets, beer and wine containers, and other debris were found. Reiser stated that it was "... quite a living area under there" [RT 91], referring to the area with heavy vegetation, bushes, and trees.

Subsequent to the hearing, the Department issued its decision which determined that the license should be denied. The decision stated:

"In the present matter, evidence establishes that the church has had an ongoing problem with transients on the church property, some of whom have been drunk or had an odor of alcohol on their breath. Issuance of the license to the premises in the immediate vicinity of the church could result in an increase of contacts with transients under the influence of alcohol; this in turn could cause further interference with the church members, including young persons and women who may feel threatened by the presence by such transients. Therefore, evidence supports the Department's decision to deny issuance of the license to [applicant]."

Applicant thereafter filed a timely notice of appeal. In its appeal, applicant raises

the issue that there is no substantial evidence to support the findings of the Department's decision that issuance of the license would be detrimental to the nearby church and its programs and people.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion to deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would be contrary to public welfare or morals.

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.

"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. 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].)

Business and Professions Code §23789 , states:

"(a) The department is specifically authorized to refuse the issuance ... of any retail license for premises located within the immediate vicinity of churches and hospitals. (¶) (b) The department is specifically authorized to refuse the issuance ... of any retail license for premises located within at least 600 feet of schools and public playgrounds or nonprofit youth facilities, including, but not limited to, facilities serving girl scouts, boy scouts, or campfire girls"

While there was extensive testimony of the possibility of using the church facilities for public school instruction of children, such was shown to be a future possibility, therefore speculative, and of no bearing on the present review .

Also, 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].)

There was sharp conflict in the evidence as to the presence and extent of the presence of transients in the immediate area

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Lindsay Olson and Patricia Olson have lived in the area for 19 years and have noticed few transients. Their home is located about 800 to 1,000 feet from the church [RT 128, 132, 141-143].

Jammie Oldham has seen transients on church property, and also alcoholic containers on the grounds. Over the past 7 years, he estimates he has seen 10 transients [RT 150, 153-154].

Raymond Fox is a member and custodian of the church. He has found alcoholic beverage containers in the area of the church during cleanup times, found transients

sleeping on the church grounds, and in autos. Most appear to have consumed alcoholic beverages prior to discovery [156-158, 160, 166-167, 170, 172-175]. However, the record shows that Fox found two people sleeping on church property, that transients would ask for food and coffee, and the use of the bathrooms, and he would inspect the church property once each month and find two to three alcohol containers each time [RT 160-162, 167, 170]. Fox also testified that since the Redding Oil Company cleaned up its area next to the church, there have been fewer transient sightings, and to the question whether there are fewer sightings of transients, and how few, he answered "yes, like five times now" [RT 178].

Dennis McGowan protested the application for the license and is the pastor of the church. He has been told transients have been found sleeping in cars and on the grounds, and liquor, wine, and beer bottles and other debris along with broken bottles have been found on the grounds. There are reports of transients urinating, defecating, and vomiting in the covered walkways. There have been reports made by church members, and of more concern, from the young children, concerning threats, and have voiced fear of transients. Services include day and night programs, with youth groups meeting during the week. Bible study programs bring upwards of 250 people [RT 183-184, 188-189, 190-192, 202].

The record is extremely deficient on the question whether issuance of the license would increase the impact on the church which from the record, appears minimal. Also, while the record seems to ignore the attempts of applicant to set up policies that would ameliorate the concerns of the protestant, the record is woefully devoid of any attempts of the Department to lend its expertise in the crafting of conditions that could resolve

the problem more satisfactorily than now present. The decision of the Department fails to address what, if any, effect conditions, properly crafted, could have in ameliorating any possible adverse impact on the nearby church.

The Department's duty is to provide all parties the advantage of its statewide expertise from these constantly occurring matters. Yet, with the many cases that come before this Board, this matter appears to be cast as an exercise of pre-judgment controlling the outcome, rather than an even-handed balancing of all available considerations. The decision of the Department cannot be said to be premised upon substantial evidence.

ORDER

The decision of the Department is reversed.²

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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 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.