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

AB-7768
File: 47-348299 Reg: 00048959

MARTIN MACKS BAR & RESTAURANT, a Corporation
1568 Haight Street, San Francisco, CA 94117,
Appellant/Applicant/Licensee

v.

JAMES B. FORSTER, JR., DOERTE MURRAY, EDWARD JAMES MURRAY, and ERWIN F. PIROLT, Protestants/Respondents

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 11, 2002
San Francisco, CA

ISSUED MAY 29, 2002

Martin Macks Bar & Restaurant (applicant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which, while overruling the protests filed in opposition to the exchange of applicant's on-sale general public premises license to an on-sale general public eating place license, imposed certain conditions on the exchange.

Appearances on appeal include applicant Martin Macks Bar & Restaurant, appearing through its counsel, Beth Aboulafia; protestants James B. Forster, Jr., Doerte Murray, Edward James Murray, and Erwin F. Pirolt, appearing through their counsel, Lawrence J. Koncz; and the Department of Alcoholic Beverage Control, appearing

---

[1]The decision of the Department, dated January 18, 2001, is set forth in the appendix.

through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

An application for the exchange was made to the Department on November 3, 1998. The exchange application was, essentially, for a change from a bar license to a restaurant license. The Department's findings allege applicant acquired the premises about 1990, and thereafter operated the premises as a bar and restaurant. However, the license issued in 1990 was for a bar type license only. During the greater part of eight years, applicant operated illegally by allowing minors to enter and remain in the premises. The premises has closing hours of 2 a.m. There are 52 residents within 100 feet of the premises.

Following the filing of the application for the exchange, protests were filed. Thereafter, an administrative hearing was held on November 2, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the exchange should be conditionally approved and conditionally dismissed the protests.

The Department determined, prior to the hearing, that if applicant consented to three conditions to be placed on the license, the concerns of the protestants would be satisfied. The conditions proposed were that (1) quarterly gross sales of alcoholic beverages would not exceed gross sales of food for the same period considered; (2) entertainment would not be audible beyond the area under the control of applicant, and windows would be closed during business hours; and (3) trash pick up would be allowed only between 6 a.m. and 10 p.m. daily. The Decision of the Department requires that applicant consent to four additional conditions: (1) installation of additional

soundproofing; (2) maintaining an in-house noise limiter to control volume; (3) all entertainment to cease at 10 p.m. nightly; and (4) the area under applicant's control to be free of litter.

Applicant thereafter filed a timely notice of appeal. In its appeal, applicant raises the following issues: (1) California Code of Regulations, title 4, §61.4 (Rule 61.4), concerning nearby residents, does not apply to an exchange of a license; (2) the findings do not establish that normal operations will interfere with nearby residential quiet enjoyment; and (3) the conditions are not reasonably related to the problem of nearby residential quiet enjoyment. Issues 1 and 2 will be considered together.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to grant or deny an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would be 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.[2]

---

[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].

I

Applicant contends that California Code of Regulations, title 4, §61.4 (Rule 61.4), concerning nearby residents, does not apply to an exchange of a license; and the findings do not establish that normal operations will interfere with nearby residential quiet enjoyment.

Applicant argues that the exchange of license does not amount to a new license, and calls attention to the Department's investigator's testimony that the exchange is not a new issuance of a license [RT 41]. This contention is extremely important to applicant's cause for if the issuance of the license is not an original issuance, thus coming within the terms of the Rule[3], then the burden to prove detrimental interference with nearby residents does not shift from the Department to applicant.

Business and Professions Code §23300[4] states: "No person shall exercise the privilege or perform any act which a licensee may exercise under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division." Section 23320 sets forth many of the types of licenses which may be issued, stating: "The following are the types of licenses to be issued ...." The Department's Instructions manual, pages L-47-50, of which we take official notice,

---

[3]Webster's New Third International Dictionary, 1986, pp. 1591-1592, defines original as: "... the source or cause from which something arises ...of or relating to a rise or beginning: existing from the start ... constituting a source, beginning, or first reliance ... not secondary, derivative, or imitative ...."

[4]All further references to code sections will be to the Business and Professions Code, unless otherwise indicated.

sets forth the different types of licenses not included in Section 23320, and include the current on-sale general public premises license, type 48, and the intended new license, an on-sale general public eating place license, type 47[5]. They carry different duties and responsibilities as well as privileges.[6]

The following observations as to the exchange of certain off-sale licenses have some instructive merit. In the case of Anderson v. Kashmiri (1992) AB-6073, the Department had been considering type 20 (off-sale beer and wine licenses), and type 21(off-sale general licenses), as one type of license, thus avoiding many of the "hoops" the Department needed to pass through in approving these types of licenses which it considered just upgrades. The Board reversed the Department, and held that the two types of licenses were separate and distinct. It was felt that the process of issuing a type 21 license from a type 20 license, was like a new license and the licensing process needed to be passed through and adhered to.

The following language is found in the Department's Instructions manual, at P. L-212:

> "When an applicant for an on-sale license for a bona fide public eating place or on-sale license for a public premises changes his application from one type to the other, all notification, posting, and publishing requirements of Chapter

---

[5]We note from Section 23320 that an off-sale beer and wine license, and an off-sale general license, are two different types, and carry different duties and responsibilities.

[6]Determination of Issues I, sets forth the statement that applicant for eight years operated illegally under its license, in that it allowed minors (those under the age of 21 years) to enter and remain within the premises. If the new license is issued, applicant may legally allow such minors to enter and remain as the license changes from a bar type license where minors are not allowed, to a restaurant type license, where minors are allowed to enter and remain.

> 6, Article 2, must be repeated. Previous ruling to the contrary were erroneous, since Section 24072.2 requires a licensee making such an exchange to follow the same procedures as an original applicant."

Section 24072.2 appears to require in such exchanges, adherence to the compliance process as required in an original issuance.

With all the above in mind, it would appear that an exchange or an upgrade from or to a bar license or to or from a restaurant license, is a new license subject to the whole process of review. Since Rule 61.4's language states it applies to original issue or premises to premises transfers, it would appear to encompass this exchange now under review. Therefore, the Rule by its own terms, applies.

Proceeding to the question of residential quiet enjoyment, 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 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 findings show that noise is a problem for the residents. Noise complaints came from residents within 100 feet of the premises, with one resident living within 10-15 feet of the premises. It was emphasized the premises remains

open with full services till 2 a.m. Noise is clearly a problem as set forth in the record and the decision.

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 ...." 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."[7]

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].

Notwithstanding the restrictive wording of the rule, the rule sets forth a procedure whereby the Department may issue a license even though the rule is applicable: "Notwithstanding the provisions of this rule, the department may issue

---

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

an original retail license ... where the applicant establishes[8] that the operation of the business would not interfere with the quiet enjoyment of the [their] property by residents."

The record shows:

1. In response to the neighbors' complaints, the Department imposed three conditions on the new license (before the hearing): (1) quarterly gross sales of alcohol and food to be equal; (2) entertainment shall not be audible outside the premises and windows to be closed; and (3) reasonable trash dumping hours.

2. Complaints by neighbors were made. [Determination of Issues III and IV].

3. There were no conditions considering just noise from patrons, only entertainment, inside or outside the premises, although patrons imbibe till 2 a.m.

The record and decision adequately sets forth the problems of noise, with the Department apparently concluding the new conditions mainly addressing entertainment noise, were sufficiently focused to protect reasonable quiet enjoyment.

II

Applicant contends the conditions are not reasonably related to the problem of nearby residential quiet enjoyment.

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set

---

[8]Webster's Third New International Dictionary, 1986, page 778, defines the word "establish," in the archaic form, as "to prove or make acceptable beyond a reasonable doubt," apparently meaning to prove.

forth in §23800, subdivision (a), is that "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the department may grant the license subject to those conditions. Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...."

We therefore view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"[9] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The conditions sufficiently appear to address noise generally, and late night noise in particular:

1. Controlling the tendency to create a nightclub atmosphere after the dinner hour, by conditioning the gross food and alcoholic beverage sales to be at least equal;

2. Entertainment is not to be audible beyond the premises;

3. Installation of additional sound control materials and volume control appliances; and

4. Cessation of entertainment at 10 p.m. nightly.

All of the conditions to be imposed on the new license appear to be a

---

[9]See Webster's Third New International Dictionary, 1986, page 1524.

reasonable exercise of discretion and calculated to protect the quiet enjoyment of nearby residents, except the condition mandating a nightly entertainment cessation which appears unreasonable and arbitrary.

It is reasonable if not very proper, to control the entertainment until 10 p.m. on the work-day nights of the week. Certainly cessation at the now time of 2 a.m. is unreasonable. We have reviewed our decisions and find none that are as drastic as this condition, even considering the close proximity to homes. Reasonableness in this instance would allow for more flexibility on Friday and Saturday nights.

ORDER

The decision of the Department is affirmed, but the condition found in Determination of Issues X-3, is reversed as arbitrary and unreasonable, with the matter remanded to the Department for reconsideration in accordance with the views expressed herein.[10]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[10]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.