

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

AB-7775

File: 48-363119 Reg: 00049370

CARMEN CORDOVA, et al., Appellants/Protestants

v.

OCEAN PARK ENTERTAINMENT GROUP, LLC, dba Heaven
2810 Main Street, Santa Monica, CA 90405,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael A. DiSanto

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED APRIL 17, 2002

Carmen Cordova, Larry Cordova, Anita Holcomb, Tom Marketti, Elian Pascal, Patricia L. Riker, Mary Ann Rosenfeld, Cynthia Scheinman, F. Kenneth Schonlau, and Laurie J. Wright (protestants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Ocean Park Entertainment Group, LLC, doing business as Heaven, now called the Mix (applicant), for a person to person/premises to premises transfer of an on-sale general public premises license.

Appearances on appeal include protestants Carmen Cordova, Larry Cordova, Anita Holcomb, Tom Marketti, Elian Pascal, Patricia L. Riker, Mary Ann Rosenfeld, Cynthia Scheinman, F. Kenneth Schonlau, and Laurie J. Wright., appearing through

¹The decision of the Department, dated March 1, 2001, is set forth in the appendix.

their counsel, Joshua Kaplan; Ocean Park Entertainment Group, LLC, appearing through its counsel, Kenneth L. Kutcher; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

On February 8, 2000, applicant filed its application for the transfer of the license to its location on Main Street in Santa Monica, California. Protests were subsequently filed in opposition to the transfer and issuance of the license.

An administrative hearing was held on October 18, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the protestants had not sustained their burden to show the license should not be issued.

Protestants thereafter filed a timely notice of appeal. In their appeal, protestants raise the issue that the findings of the Department's decision are not supported by substantial evidence.

DISCUSSION

Protestants contend the findings are not supported by substantial evidence, arguing that Business and Professional Code §23958.4 applies as well as Business and Professions Code §23790, and the declaration of applicant was improperly admitted. It appears Findings IV, VII, VIII, X, XI, and XVIII, and Determination of Issues VI, VIII, and IX, are the focus of protestants' objections.

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

not 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. 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. 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].)

²The 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].

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].)

The Department investigator testified that issuance of the license must be to a premises which is properly zoned [RT 33, 59]. Business and Professions Code §23790, states:

"No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city...."

In accordance with her duties as the investigating representative of the Department, the investigator contacted a city planner by phone who told her no Conditional Use Permit (CUP) was needed [RT 34, 69]. The investigator was not able to testify as to the date of that conversation as she did not make a notation on her report [RT 70]. Ordinarily, such a conclusion would suffice as in most cases the CUP is not at issue in a proceeding. However, protestants have raised the issue in this proceeding, and there is evidence in the record which throws considerable doubt that the premises is properly zoned.

In Exhibit III, applicant certified that no CUP was needed. Notwithstanding, the matter is complicated by Exhibit II, which is a letter from the City Planning Division, issued by the Acting Senior Planner, which casts doubt that a CUP was issued, or is required to be issued. The letter sets forth concerns as to whether the premises' prior operation ceased and the new operation began within six months following cessation of the other licensed operation.

The Department investigator testified that the prior operation ceased on

December 16, 1999 [RT 53, 153]. Then based upon Exhibit II, and the testimony of the Department's investigator, we cannot locate any verifiable testimony and evidence in the record which could remotely be classed as being in conformity with §23790.

The decision of the Department finds that applicant obtained a business license from the city (Finding III), and concludes that if the city issued a business license then no CUP was needed (Finding XI). Finding X states that no CUP is needed because this a continuation of an existing use, a statement much in error, as per Exhibit II. The decision also errs conveying the idea that since the prior premises' owner relinquished the license on February 8, 2000, that is the date to be used. The requirements appear to use the cessation of business as the marking point, not the deliverance of the license date.

However, the record shows that an interim permit was issued by the Department on August 8, 2000, per the investigator [RT 28, 90], protestant Holcomb [RT 155], and applicant [RT 178]. Applicant stated the premises was open and serving alcoholic beverages as early as June 12, 2000 [RT 178], by way of a catered event. We have great difficulty accepting the implications of applicant's testimony that the premises was open and operating legally, as he had no license, and the interim permit was not issued until August 8, 2000, apparently 26 days after the alleged opening date. The use and reliance on a caterer's permit, if issued, since there is no evidence of such, is not well grounded from a reading of Business and Professions Code §23399.

Applicant's claim, and the findings of the ALJ as to a business license being

proof of conformity to the zoning laws, seems misplaced. Applicant states that he was in possession of a business license which was issued on June 1, 2000. The license is a Business License Tax Certificate, and notes that it is issued pursuant to the city business license tax ordinance, apparently not a factor in the present matter. Notwithstanding, the Administrative Law Judge (ALJ) apparently erroneously stated in Finding XI, that “A license would not be issued by the City of Santa Monica if a Conditional Use Permit were required by the City of Santa Monica.”

Protestants’ contend that Business and Professions Code §23958.4, is applicable.

The statute concerns “undue concentration” of licenses within a census tract. Since that is a premises to premises transfer, that is, a license is being brought to this new location, ordinarily, the statute would be applicable.

However, the last provision of the statute states that it does not apply if the premises (the prior licensed business) had been licensed and operating with the same type license within 90 days of the application for a transfer. There is substantial evidence in the record that applicant conformed to the provisions of the statute.

The business operation with the same type license that is being considered in this appeal, ceased on December 16, 1999. The application filed by applicant was dated February 8, or 9, 2000 (depending on the different testimony given). Such would negate the applicability of the statute.

Protestants’ contention that a declaration by applicant was erroneously made part of the record.

A review of the record shows that applicant was at the hearing, gave testimony concerning the matter, and was, apparently, fully cross-examined. The declaration was redundant, but contains improper hearsay. We have read the record, and can find no prejudice to protestants.

ORDER

From a reading of the record, we conclude that the Department intended to issue the license, no matter the evidence. We find the record replete with innuendos and suppositions substituted for properly presented evidence.

The decision of the Department is reversed and remanded to the Department to conduct a proper investigation whether it properly may issue the license based on proper substantial evidence and not conjecture.³

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

³This 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.