

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

AB-7775a

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: Sonny Lo

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 24, 2004

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 (applicant), for an on-sale general public premises license.

Appearances on appeal include protestants, appearing through their counsel, Rick A. Blake; applicant Ocean Park Entertainment Group, LLC, appearing through its counsel, Kenneth L. Kutcher; and the Department of Alcoholic Beverage Control,

¹The decision of the Department, dated April 3, 2003, is set forth in the appendix.

appearing through its counsel, Matthew Ainely.

FACTS AND PROCEDURAL HISTORY

On February 8, 2000, applicant petitioned for transfer of an on-sale general public premises license to its location on Main Street, Santa Monica, California. Protests were 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. Subsequently, the Department issued its decision which determined that the protestants had not sustained their burden to show the license should not be issued.

Thereafter, protestants filed an appeal with the Appeals Board, which on April 17, 2002, issued its decision reversing and remanding the matter back to the Department for further proceedings. The issue that the Appeals Board felt was not resolved was whether a CUP (Conditional Use Permit) was either issued or exempt. The Department's decision was grossly lacking in evidence in that area of inquiry.

Pursuant to the decision of the Appeals Board, a further administrative hearing was held on March 5, 2003.

Subsequent to the hearing, the Department issued its decision which again denied the protests and allowed the license to be issued.

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

DISCUSSION

For the Department to issue a license, the premises must be properly zoned. Business and Professions Code section 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

The decision of the Appeals Board stated that:

[W]e cannot locate any verifiable testimony and evidence in the record which could remotely be classed as being in conformity with section 23790.

The Order of the Appeals Board found the administrative hearing and decision of the Department was not consistent with a fair hearing, wherein it stated:

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.

At a hearing before the Department following the decision of the Appeals Board, Tony Kim, an associate planner of the City of Santa Monica, testified that a CUP was not required in this matter [RT 14-15]. His testimony was consistent with Kim's letter of June 24, 2002, concerning the need for a CUP, which letter was sent to the Department [Exhibit 2]. Attached to Kim's letter, was a copy of the City's Alcohol Determination Application, dated April 17, 2000, and showing an approval on June 7, 2000.

Protestants' contention that the Department's decision's findings are not supported by substantial evidence is with some merit, as there is evidence which raises some questions as to the City's procedures. But the Board feels the law is clear and sufficient in this matter, that "substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When 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].) While the Board may feel there is substantial evidence against the decision, we must find for the Department in that it is the discretion of the Department which determines if a license should be issued, if there is substantial evidence to support that decision.

The law is clear that the Department is authorized by the California Constitution to exercise its discretion whether to issue or not issue an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting, or the denial, of such license would not be contrary, or would be contrary, as the case may be, to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may issue or deny a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." (*Martin v. Alcoholic Beverage Control Appeals Board* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from *Weiss v. State Board of Equalization* (1953) 40 Cal.2d 772, 775.) "[T]he Department's role in evaluating an application for a license to sell alcoholic beverages is to assure that the public welfare and morals are preserved 'from probable impairment in the future.'" (*Kirby v. Alcoholic Beverage Control Appeals Board (Schaeffer)* 7 Cal.3d 433, 441 [102 Cal.Rptr. 857, 498 P.2d 1105.]

The record shows substantial evidence that the premises was exempt from the requirements of the CUP, based on Kim's testimony and his exhibit. While the Board may have questions whether the process within the city was proper, we are without

authority to go past the evidence that attests to the correctness of the process. The Department, with proper evidence, exercised its discretion to issue the license. The Board is duty bound to support that properly founded discretion.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.