

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

AB-7777

File: 21-368275 Reg: 00050107

CORNELIUS A. PETTUS, SR.,
Appellant/Protestant
v.

RALPH'S GROCERY COMPANY dba Food 4 Less #777
Slauson Avenue & Western Avenue (SWC), Los Angeles, CA 90047,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: March 7, 2002
Los Angeles, CA

ISSUED MAY 16, 2002

Cornelius A. Pettus, Sr., (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Ralph's Grocery Company doing business as Food 4 Less #777, for the person-to-person and premises-to-premises transfer to it of an off-sale general license.

Appearances on appeal include appellant/protestant Cornelius A. Pettus, Sr.; Ralph's Grocery Company, appearing through its counsel, John Caragozian; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated March 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In July 2000 applicant filed an application for the transfer to it of an off-sale general license which it planned to use in its operation of a low-price, warehouse-style supermarket. Appellant filed a protest against the application and an administrative hearing was held on March 2, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the application and the protest by Department investigator Gerardo Sanchez, by Patrick Barber, who is applicant's vice-president for real estate, and by appellant Cornelius Pettus, Sr.

Subsequent to the hearing, the Department issued its decision which determined that the protest should not be sustained.

Appellant thereafter filed a timely notice of appeal in which he contends that: 1) three "consideration points" were not considered because they were erroneously held to be more than 600 feet from the proposed premises; 2) the Los Angeles Police Department raised concerns that additional establishments would increase crime in the area; and 3) the ALJ disregarded the community's wishes.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance 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. 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

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].) Rather, where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

I

Appellant contends that the Department erroneously ignored and failed to notify an elementary school, a church, and a homeless shelter that are all located within 600 feet of the proposed premises. He attributes the error to applicant's failure to include

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].

these consideration points in the documents applicant was required to provide in the course of the application process and to the mis-measurement of the 600-foot radius.

Sanchez, the Department investigator who handled this application, testified that there were "two or three" churches within a 1,000-foot radius from the proposed premises. [RT 18.] He only attempted to contact two of the three churches he said, because, "[t]he third, in my estimation, is not within 600 feet of the premises." [RT 19, 20.] His estimation was challenged by appellant during cross-examination, and Sanchez explained that he had arrived at the determination that the third church was not within 600 feet by using a "Range Master," a binocular-like device that apparently computes the distance from one place to another.

During appellant's testimony, he asserted that an elementary school, a church, and a homeless shelter were within 600 feet of the proposed premises according to his calculations based on the "city map." [RT 43, 48, 77.] He asked that measurements be taken again with regard to the three locations to verify the distance from the proposed premises. [RT 43, 77.]³

The ALJ addressed these contentions in Finding III:

"Department Investigator Gerardo Sanchez testified that he used a Rangefinder to determine the distance between Applicant's premises and the consideration points, and that the distance between Applicant's premises and each of those consideration points was at least 650 feet. Mr. Pettus did not present any

³At oral argument before this Board, appellant clarified somewhat his objection to the measurement method used. He pointed out that the address of the premises listed on all the application material was simply the southwest corner of Slauson and Western. He computed his measurements from that corner, but the Department measurements were taken from the premises itself, which is apparently set back from the corner. The Department's practice is to take measurements from the edge of the premises or its parking area. (See 4 Cal. Code Regs. §61.4.)

evidence to refute the investigator's testimony. Accordingly, the investigator's testimony is accepted as accurate."

We must agree with the ALJ's finding. Appellant did not specifically identify the locations he alleged were within 600 feet, nor did he show how he made his calculations. He did not present enough evidence to raise doubts about the accuracy of the investigator's measurements. Therefore, we cannot say that the ALJ's finding was erroneous.

II

Appellant contends the Los Angeles Police Department raised concerns that additional establishments would increase crime in the area.

The decision addressed the crime issue in Findings IV-A and V:

"[IV-A] The crime statistics for 1999, the most recent year for which such statistics are available, show that there was an average of 313 crimes in each of the crime reporting districts in Los Angeles. The crime reporting district in which Applicant's premises are located reported 276 crimes for 1999.

"[V] Applicant's premises are located in the Los Angeles Police Department's 77th Division. The sergeant in charge of the vice section for the 77th Division had no objection to the issuance of an alcoholic beverage license to Applicant."

The ALJ determined that "The evidence does not support a determination that issuance of an alcoholic beverage license to Applicant would tend to create a law enforcement problem." (Determination III-A.)

Appellant's assertion is based on an excerpt from a Los Angeles City Planning Commission Report dated December 2, 1999 [Exhibit E]. As the Department points out, however, Planning Commission Reports are not controlling in Alcoholic Beverage Control licensing. Even if they were, appellant has quoted language of the report out of context. Although such concerns were expressed, the police representative agreed

that alcoholic beverage sales can be regulated and controlled to reduce the potential problems. The Commission ultimately strongly endorsed the project of which appellant's premises are part.

Given the Planning Commission Report overall endorsement of the project and the evidence that the LAPD, when contacted by the Department, had no concerns about applicant's proposed premises, we cannot say that the ALJ erred in his determination that issuance of this license would not tend to create a law enforcement problem.

III

Appellant contends the ALJ disregarded the community's wishes, because no nearby residents appeared in support of issuance of the license.

There simply is no evidence of the community's opposition to issuance of this license. Appellant's representation that the community did not want alcoholic beverages to be sold at applicant's store is unsupported. He did not purport to represent any merchant's, residents' or community group. Although no community members or groups appeared in support of the license, neither did any other protestants actually appear to oppose the license.

The Department and the applicant make much of the fact that appellant holds an off-sale beer and wine license, and is the only other off-sale licensee within 1000 feet of the proposed premises. It is important to note that motive does not affect the ability of anyone to protest a license, and, as Department counsel said at the hearing, "a local merchant, even if they are a licensee, can have legitimate concerns raised about a new licensee beyond business concerns." It cannot automatically be assumed that a

potential competitor's protest is made in bad faith or solely to harass, and we make no such assumption here.

In the present case, there were about 79 protests filed, but all but three were unverified. Of the three verified protests, two were withdrawn, leaving Mr. Pettus the only protestor. Clearly, there were some concerns about this license. The evidence presented at the hearing, however, overwhelmingly supports the granting of the license.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.