

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

AB-7855

File: 41-364336 Reg: 01050455

RALPH WILLIAM DITULLIO, dba Nonno's Pizza
21433 Broadway, Redwood Estates, CA 95033,
Appellant/Applicant

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: July 11, 2002
San Francisco

ISSUED OCTOBER 3, 2002

Ralph William Ditullio, doing business as Nonno's Pizza (appellant/applicant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which made issuance to him of a conditioned on-sale beer and wine public eating place license contingent on his agreement to an additional condition on the license.

Appearances on appeal include appellant/applicant Ralph William Ditullio, appearing through his counsel, Carol L. Koenig, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant applied for an on-sale beer and wine public eating place license, with eight conditions attached, in March 2000. Protests were filed, and the Department conducted an investigation pursuant to Business and Professions Code section 23958, resulting in a recommendation that the license be issued with the eight conditions.

¹The decision of the Department, dated June 21, 2001, is set forth in the appendix.

An administrative hearing was held on May 22, 2001, at which time documentary evidence was received and testimony concerning the grounds for the protests was presented. Three of the five protestants appeared at the hearing: Bruce Cotter, Soo Park, and George Werner.

Appellant's restaurant is located in Redwood Estates, an unincorporated private residential community in a mountainous area approximately six miles from Los Gatos. The privately maintained roads in Redwood Estates are narrow, steep, and winding, with no street lighting.

Only three non-residential establishments are located in Redwood Estates, all located on Broadway Street.² Appellant's establishment is small, with three tables inside seating nine people, four tables in an outside patio area, and about seven off-street parking spaces in front of the building. Directly across the street from appellant's building is the Redwood Estates Store, a small market licensed as an off-sale general premises which is owned by Soo Park, one of the protestants. Next to the market is a post office.

Appellant's hours of operation are 6:30 a.m. to 11:00 a.m. on Mondays and Tuesdays, 6:30 a.m. to 8:30 p.m. on Wednesday and Thursday, and 6:30 a.m. to 11:00 p.m. on Friday and Saturday. The business is closed on Sundays. During the morning hours, appellant serves coffee, donuts, and similar fare. On Wednesdays and Thursdays, appellant has pasta dinners to eat on the premises or to take out. Fridays and Saturdays, appellant serves barbecued ribs, steaks and chicken. Appellant also sells "take-and-bake" pizzas.

²Despite its name, Broadway is like the other streets in the area: narrow, steep, winding, and without street lights or sidewalks.

The conditions originally proposed for the license limit the hours for sales of alcoholic beverages and prohibit:

- a bar or lounge area on the premises;
- quarterly gross sales of alcoholic beverages exceeding quarterly gross sales of food;
- the exchange of the license for a public premises license;
- noise audible beyond the area under appellant's control;
- loitering, litter, and the consumption of alcoholic beverages on property adjacent to the licensed premises over which appellant has control.

The Administrative Law Judge (ALJ) determined that the evidence did not establish undue concentration of licenses in the area and that licensing would not add to the existing parking or traffic problems in the immediate area. He also determined that normal operation of the premises would not cause any loitering problems as long as appellant complied with the conditions shown on his petition for conditional license. He then ordered that the license issue, subject to applicant's agreement to an additional condition prohibiting applicant from exercising the off-sale privileges of the license.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issue: the findings are not supported by substantial evidence in light of the whole record, and the decision is not supported by the findings.

DISCUSSION

Appellant contends that substantial evidence does not exist to support the finding that persons loiter and consume alcoholic beverages on property adjacent to, or controlled by, appellant, and that the findings do not support the decision to add a condition prohibiting appellant from exercising the off-sale privileges of the license.

The protestants raised three issues at the administrative hearing, contending that issuance of the license would result in an undue concentration of licenses, cause or aggravate parking and traffic problems, and create or aggravate an existing police

problem. The ALJ concluded that the first two contentions were not proven. With regard to the "police problem" issue, he states in Finding 7:

"In the past young persons, both minors and adults, frequently loitered near the Redwood Estates Store, drinking alcoholic beverages in public and interfering with the store's patrons and prospective patrons. During the past six months the owners of the market, in conjunction with the Santa Clara County Sheriff's Department, have taken steps that have largely eliminated this condition. However, such persons now loiter and consume alcoholic beverages near the southeast portion of the premises, at times on the property under the applicant's control. This occurs primarily on Friday and Saturday nights. The Santa Clara Sheriff's Department does not consider this activity to pose a law enforcement problem. It has no objection to the issuance of the applied for license."

The ALJ further found, in what he designated as "Legal Conclusion 4":

"Applicant is well aware that persons loiter at or near the area where he prepares his barbecue dinners at the southeast portion of his property. He is also well aware that under the conditions enumerated in the petition for conditional license he must prevent loitering, littering and drinking in this area as well as on all of the property over which he has control.

"It is the view of the Department, based on the Department's communications with the Office of the Santa Clara Sheriff, that any loitering problem has been greatly reduced during the past six months. It is also the view of the Department that it is unlikely the normal operation of the premises will be the cause of any problems associated with loitering, provided the applicant complies with the conditions in the petition for conditional license that deal with littering, loitering and drinking.

"An additional condition, that applicant shall not exercise the off-sale privileges of the license, would help minimize any problems associated with littering, loitering and drinking."

A. Are the findings supported by substantial evidence?

When the Department's findings are attacked on the ground of 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].)

"Substantial evidence" is relevant evidence which reasonable minds would

accept as adequate support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456].) It "is not synonymous with 'any' evidence, but is evidence which is of ponderable legal significance," and

"must be 'reasonable in nature, credible, and of solid value' [Citations.] Thus, the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'"

(*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872 [269 Cal.Rptr. 647].)

The requirement that the "whole record" must be considered means that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight." (*Universal Camera Corp. v. Labor Board, supra*, 340 U.S. at 488.)

The only evidence even remotely supporting the finding that "such persons now loiter and consume alcoholic beverages near the southeast portion of the premises, at times on the property under the applicant's control," was that of Jean Christiansen, the wife of one of the protestants.³ She testified that she had seen loitering south of applicant's restaurant on Friday nights when she drove home from work. She asserted that "there has been for years consistent loitering and drinking by younger people in that area to the point where many time[s] I have had to stop my car because I can't get around the people standing in the street talking, loitering, sometimes drinking." [RT 66.] She vaguely described the area where she had seen the loitering as south of applicant's restaurant, directly across from the Post Office.

When the ALJ asked whether she had observed the loitering a year ago or more

³Christiansen was not a named protestant, but testified in place of her husband because he said his voice had been impaired to some degree by neck surgery.

recently, Christiansen replied: "I have seen it more regularly a year ago and I saw it for years prior to that. And that's why I am concerned about the liquor license, that that might start up again." [RT 68.] When asked the last time was that she had seen the loitering, she replied, "I don't recall. I would say within the last three months." [RT 69.]

Protestant Park said, during the testimony of the Department investigator, "I have called your Department's people because there is drinking across the street – or for some other problems." [RT 40.] She then corrected herself, saying that it was someone from the Department who called her. Her disjointed testimony was difficult to understand, but someone apparently "complained that people were drinking in that area, parking lot. And we don't have a parking lot, other than across the street." [RT 41.]⁴ The investigator had no knowledge of anyone calling the Department about such a problem, nor did he know of anyone from the Department calling Park.

In contrast, the Department investigator testified that he contacted one of the deputy sheriffs who regularly patrol the area, and was told that the loitering problem that had existed *at Park's store* had been "cleaned up" six to eight months prior to the investigator's contact in January 2001. [RT 24-25.] The investigator's report stated that the deputy also said "that neither the applicant nor the applicant's restaurant operation has represented a law enforcement problem in the past." (Exhibit 2, p. 7.)

Park and Christiansen mentioned loitering *in the street*, in front of Park's store, in the parking lot for Park's store, and at some undefined place on or near appellant's premises. Neither gave any specific dates or instances, and it was not clear what time

⁴The parking lot across the street from Park's store is just north of applicant's restaurant, and Park made a point during her testimony that the parking lot there was solely for *her* customers. [RT 78-79.]

period they referred to. Even if the ALJ for some reason accepted their testimony as credible⁵, the "evidence" they presented was clearly not of "ponderable legal significance," "reasonable in nature," or "of solid value."

The evidence presented clearly established that *the loitering and drinking problem was at protestant Park's store*, and even that was "cleaned up" six to eight months before the investigator contacted the sheriff's deputy in January 2001 [RT 24-25], not six months prior to the hearing on May 22, 2001. The loitering problem had ceased to exist *a year or more before the hearing*, in April or June of 2000.

There is absolutely no basis in the record that we can find supporting the ALJ's finding that the "loitering problem," rather than being essentially eliminated, somehow moved across the street to applicant's property. Even assuming there is a loitering problem that still exists at times, the only distinct location of loitering mentioned was in *the street*, not on applicant's property.

In Legal Conclusion 4, the ALJ stated that the applicant was "well aware" of loitering on or near his property. We can find nothing in the record supporting this

⁵Park's testimony was especially suspect. Her major concern is quite plainly the competition that appellant's licensed premises will create if he is allowed to exercise the privilege of an on-sale licensee to also sell for off-sale (Bus. & Prof. Code §23401) (note Park's comment at RT 39: "the on-sale and off-sale – that bothers me the most.") Park was the only protestant to mention loitering as a problem in her protest. Most of her descriptions of the problems with young people loitering, however, actually refer to the problem *she* had in front of *her store* previously. She is the only one who alleges that the young people have changed their venue from her store to applicant's parking lot. (Protest letter of Soo Park, dated March 31, 2000, p.2.) There was no evidence that applicant's sale of beer or wine contributed to any problem of loitering or littering during the time he had his interim license. Quite frankly, we find it incredible that the ALJ not only appears to have found Park credible, but based his decision on her complaint. Clearly, the inability to sell for off-sale, when applicant's main business is selling take-and-bake pizza, makes the license virtually worthless to him and to the community which apparently prefers to take their pizza and beer home to eat.

finding. The applicant testified about a group of young people who congregate at a point *beyond* his fenced property. [RT 95.]

Viewing the record in its entirety, we can only conclude that the findings noted above are not supported by substantial evidence.

B. Do the findings support the decision?

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 Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [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 Bev. 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 Bev. Control Appeals Board (Schaeffer)* 7 Cal.3d 433, 441 [102 Cal.Rptr. 857, 498 P.2d 1105.]

The Department may impose "reasonable conditions" on a license "[i]f grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions." (Bus. & Prof. Code §23800, subd. (a).)

Section 23801 states that the conditions "may cover any matter . . . which will protect the public welfare and morals"

We 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 reasonable connection between the problem that needs to be eliminated and the condition designed to eliminate the problem.

Here, there is not the necessary connection between the problem and the condition imposed. In fact, the existence of a problem needing to be eliminated is not supported by substantial evidence, as discussed above.

The ALJ made a "legal conclusion" (really just another finding) "that any loitering problem has been greatly reduced during the past six months. . . . [and] that it is unlikely the normal operation of the premises will be the cause of any problems associated with loitering, provided the applicant complies with the conditions in the petition for conditional license that deal with littering, loitering and drinking." Having found that there will not be a problem if the applicant complies with the existing conditions on the license, the ALJ eliminated any basis for imposing an additional condition.

Given that appellant will be under a continuing obligation to police the area on a regular basis to ensure that there is no loitering, littering, or drinking in the area under his control, it is unreasonable on the part of the Department to add the further, more restrictive, condition precluding applicant from exercising the off-sale privileges of his license.

We must assume that, if applicant does not comply with the conditions to police the area and take action when necessary, and legitimate complaints are registered

with the Department, the Department will take appropriate enforcement action. But, at present, the evidence, viewed in light of the entire record, is not of the nature and quality which we consider substantial evidence of the kind required to support the proposed imposition on applicant's operation.

ORDER

The decision of the Department is reversed as to that part of its order requiring the additional condition set forth in "Legal Conclusion 5," and the matter is remanded to the Department for such further proceedings as may be necessary and appropriate in light of the foregoing opinion.⁶

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

⁶This 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.