

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

AB-7922a

File: 41-371746 Reg: 01051166

WANDA ADAMS, ET AL., Appellants/Protestants
v.

RAYMOND BROAD and DERNIE WAIKIKI, dba Springville Ranch
36400 Highway 190, Springville, CA 93265,
Respondents/Licensees

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 12, 2003
San Francisco, CA

ISSUED JULY 31, 2003

Wanda Adams, Adrian W. Adams, David Robertson, William J. Woodmansee, Therese Woodmansee, Vernon Miller, Gloria Miller, Dean Semple, Joy Semple, and Andrea Culver (appellants/protestants) appeal from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Raymond Broad and Dernie Waikiki, doing business as Springville Ranch (respondents/licensees), for an on-sale beer and wine public eating place license.

Appearances on appeal include appellants/protestants Wanda Adams, Adrian W. Adams, David Robertson, William J. Woodmansee, Therese Woodmansee, Vernon Miller, Gloria Miller, Dean Semple, Joy Semple, and Andrea Culver, appearing through their counsel, Adrienne K. Miller; respondents/licensees Raymond Broad and Dernie

¹The decision of the Department, dated February 19, 2003, is set forth in the appendix.

Waikiki; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

This is the second appeal involving issuance of an alcoholic beverage license for Springville Ranch.

The licensees, then applicants, applied for an on-sale beer and wine public eating place license, and a number of protests were filed by nearby residents. An administrative hearing was held, resulting in a Department decision which sustained, in part, certain of the protests, but allowed the applicants to petition the Department for a license incorporating conditions they had previously agreed to,² as amended and augmented by conditions set out in the Department's decision. One of the additional conditions, number 7, stated that "Live entertainment provided on the licensed premises shall be limited to non-amplified sources and to no more than three musicians at a time, including vocalist(s)."

The applicants appealed the Department's decision, contending that condition 7 was improperly imposed but agreeing to all the other conditions. The protestants did not appeal the Department's decision, but they filed a brief with the Appeals Board with regard to the applicants' appeal. Their brief did not address the issue appealed, whether condition 7 was properly imposed, but reargued the matter in its entirety,

²The conditions previously agreed to restricted the hours of alcoholic beverage sales and consumption and the hours of entertainment; required licensed security guards, the number of which would be dependent upon the number of people attending an event and whose purpose was to maintain order "and prevent any activity which would interfere with the quiet enjoyment of their property by nearby residents"; and prohibited consumption of alcoholic beverages on property adjacent to the licensed premises which is controlled by appellants.

asking the Appeals Board to reverse the decision of the Department granting the license, or, in the alternative, to impose a condition of no amplified music, whether live or recorded.

On January 15, 2003, the Appeals Board issued its decision (AB-7922), finding that condition 7 was not properly imposed. The Appeals Board reversed the Department decision as to the requirement that appellants must include condition 7 in their petition for conditional license, affirmed the remainder of the decision, and remanded the matter to the Department "for such further proceedings as may be necessary and appropriate."

On February 19, 2003, the Department issued a Decision Following Appeals Board Decision which allowed the license to issue subject to the conditions initially included in the applicants' petition for conditional license and conditions 3 (as modified), 5, and 6, as set out in Determination of Issues VI of the Department's original decision. Condition 7 was not included in the order. The license was issued, without condition 7 but with all the other conditions as set out in the Department's original decision, on March 6, 2003.

The protestants thereafter filed a notice of appeal of the Department's February 19 decision in which they raise the following issues: (1) The decision is erroneous because not consistent with the decision of the Appeals Board, and (2) the decision is contrary to public welfare and morals. These two issues are related and will be discussed together.

DISCUSSION

Appellants contend that the Department ignored this Board's decision by eliminating condition 7 (restricting live entertainment), but failing to impose any other

condition restricting noise, resulting in a decision that is contrary to public welfare and morals. They assert that the Department improperly treated much of the discussion in the Board's opinion as dicta, rather than directions, and ask this Board to direct the Department to impose a meaningful condition restricting amplified music.

In its decision, the Board referred to Determination of Issues V-B in the Department's original decision, which states:

The Protestants have been disturbed by noise from events occurring at the proposed premises in the past. The evidence strongly suggests that such disturbances were more frequent and of greater intensity when the property was in the hands of prior owners. The conclusion of Investigator Acosta that operation of the business with reduced late night hours of operation, restricted areas for consumption of alcoholic beverages and security guards will reduce adverse impacts upon nearby residents, makes sense given the record as a whole. Adverse noise impacts on nearby residents will be less, even under ownership by Applicants, operating under a Department-issued license than if they continue to operate restricted solely by the conditions attached to the SUP. This is in contrast to the supposition of some of the Protestants that if the Applicants are licensed, more alcoholic beverages will be consumed and noise difficulties will worsen. The adverse noise impacts that remain will be reasonable.

In its opinion in AB-7922, the Board commented on that paragraph, saying:

In paragraph B., above, the determination states that, under the conditions in applicants' petition for conditional license and in the Special Use Permit issued by Tulare County (SUP), "The adverse noise impacts that remain will be reasonable." Having determined that there will not be a problem if the applicant complies with the existing conditions on the license, the ALJ eliminated any reasonable basis for imposing additional conditions regarding noise.

The Board then discussed the statement in Determination of Issues V-C that, "Concern also exists that special events, such as 'rock' or other concerts, not mentioned by anyone at the hearing or by Applicants in their submission to the Department could take place that would make the conclusion reached in the preceding paragraph erroneous." This determination was the basis for the ALJ's imposition of

condition 7, and the Board concluded "that the determination upon which the condition is based is not supported by any evidence in the record, much less substantial evidence."

The Board went on to explain why it also found the condition was neither supported by the determination nor reasonable. Appellants quote the last paragraph of the decision (except for the last sentence), contending that this states the directive of the Board that the Department ignored:

Imposing conditions on this license is appropriate, given the past experience of the neighbors. However, we fail to see how the live entertainment restrictions imposed by the Department's decision will have any discernable effect, one way or the other, on the neighbor's quiet enjoyment of their property. The condition goes too far, by prohibiting amplification of all live entertainment, and not far enough, by not putting any kind of restriction on recorded music or entertainment. We do not mean to suggest that it would be appropriate for the Department to impose a ban on amplification of all music. The Department may devise a condition that restricts noise, but it must be reasonable from the perspectives of both the nearby residents and the license applicant.

The last sentence of the paragraph reads: "If the Department cannot do so, that does not give it authority to impose a condition that unreasonably restricts certain types of noise and does not even address other types."

Appellants have mistaken the nature of the language quoted and the extent of the Appeals Board's authority. The Department may not impose a condition unless it is reasonably related to resolution of the problem for which the condition was designed. The paragraph just quoted explains why the condition was not reasonably related to the problem it purported to address. It concludes with the observation that the Department *may* impose a restriction on noise, but if it does, the restriction must be reasonable. If a reasonably related condition cannot be crafted by the Department, it may not impose an unreasonable one.

The Board's decision does not *require* the Department to impose a noise restriction. As noted above, the ALJ determined that, as long as the licensees adhered to the SUP and the conditions already agreed to, there would not be an unreasonable impact from noise. In the face of that conclusion, which was not challenged, the Board could not make a contrary finding that a noise restriction was required.

Even if the Board believed that the Department was required to impose a restriction on noise, its only option would be to remand the matter to the Department so that the Department could devise a reasonable solution to the problem. The Board may suggest alternatives to the Department when it remands a matter, but it "shall not limit or control in any way the discretion vested by law in the department." (Bus. & Prof. Code, § 23085.)

In this instance, the Board found no support for imposition of condition 7, both because the Department's decision found that no restriction on noise was necessary (Det. of Issues V-B) and, secondarily, because the condition imposed was not reasonable. On remand, the Department exercised its discretion and allowed the license to issue without condition 7, but with the other conditions that it had found necessary and adequate to protect the quiet enjoyment of the residents. While there could be disagreement with the decision of the Department, the Appeals Board cannot say that the Department abused its discretion in this instance.

In any case, protestants did not appeal the original decision of the Department or file a petition for a writ of review from the decision of the Appeals Board, so they are not entitled now to raise objections that they did not raise when it was appropriate to do so.

ORDER

The decision of the Department is affirmed.³

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

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.