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

AB-8007
File: 47-335025 Reg: 01051218

JAMES LISSNER, Appellant/Protestant

v.

FAT FACE FENNER'S FALLOON, LTD, dba Fat Face Fenner's Fishack
49-L and 53-O & P Pier Avenue
Hermosa Beach, CA 90254
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 17, 2003

James Lissner (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of Fat Face Fenner's Falloon, LTD, doing business as Fat Face Fenner's Fishack (respondent/applicant), for the person-to-person and premises-to-premises transfer of an on-sale general public eating place license.

Appearances on appeal include appellant/protestant James Lissner; Fat Face Fenner's Falloon, LTD, respondent/applicant, appearing through its counsel, Kurt L. Schmalz; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated July 5, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant, the holder of an on-sale beer and wine public eating place license with no conditions, petitioned for the person-to-person and premises-to-premises transfer, with conditions, of an on-sale general public eating place license. Protests were filed by appellant and others, and an administrative hearing was held on October 11, 2001. At that hearing, oral and documentary evidence was presented concerning the application and the protests. Appellant was the only protestant to attend the hearing; six other protestants did not attend.

Subsequent to the hearing, the Department elected not to adopt the proposed decision of the Administrative Law Judge (ALJ), which overruled the protests and granted the license, with a modification to condition 6. The Department issued its own decision pursuant to Government Code section 11517, subdivision (c), which dismissed the protests of those protestants who did not appear and overruled appellant's protest, subject to the applicant submitting a petition for conditional license which included the six conditions already agreed to by applicant and a modification of condition 5.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) The Department's decision failed to make a determination of public convenience or necessity, as required by Business and Professions Code[2] section 23958.4, subdivision (b)(1); and (2) the decision is contrary to public welfare and morals and deprives appellant and others of due process in that the decision is unenforceable.

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[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

DISCUSSION

I

Appellant contends the Department's decision is contrary to law because it does not include a determination that public convenience or necessity would be served by issuance of the applied-for license.

Section 23958 provides that the Department "shall deny an application for a license if issuance . . . would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." The Department may issue a license in spite of the existence of undue concentration "if the applicant shows that public convenience or necessity would be served by the issuance." (Bus. & Prof. Code, §23958.4, subd. (b)(1).)

Finding of Fact III states:

> Applicant's restaurant is located in a census tract where there is currently an "undue concentration" of licenses, as that term is defined in Business and Professions Code Section 23958.4. If the applicant's application for a Type 47 license is granted, the applicant would immediately surrender its Type 41 license. The applicant submitted a letter of public convenience or necessity to the Department. Following its receipt, and at the conclusion of its investigation, the Department recommended a conditional issuance of the applied for license.

Under the facts of this case, it was not necessary for applicant to prove that issuance of the license would serve public convenience or necessity. That proof is required only where issuance of the license would result in or add to an undue concentration of licenses. Because applicant already holds an on-sale retail license (type 41) at the premises, and that license would be surrendered to the Department simultaneously with the issuance of the type 47 license to applicant, issuance of the type 47 license would cause no change in the number of on-sale retail licenses in the census

tract. Therefore, section 25658 would not be a basis for denial of the license and the public convenience or necessity exception to section 25658 is not necessary. (*Lissner v. Miller* (2002) AB-7816; *Dahdah Trading Corporation* (1999) AB-7304.)

Even if the exception were required, applicant met its burden of showing the Department that public convenience or necessity would be served by issuance of the license by means of the letter it submitted to the Department. The Department obviously was satisfied that public convenience or necessity had been shown, since it recommended conditional issuance of the license. It was not necessary for the decision to include a specific discussion or determination regarding public convenience or necessity under these circumstances.

II

Appellant contends the decision deprives protestant and the community of their right to due process and is contrary to public welfare and morals. The decision violates due process, according to appellant, because, once the license is issued, conditions can be removed without notice to the public and an opportunity for objections to be heard. It is contrary to public welfare and morals, appellant argues, because there is no provision in the decision to prevent removal of the condition prohibiting live entertainment after the license is issued, and the ALJ found that it would be contrary to public welfare and morals for the license to issue without that condition.

Appellant made, and this Board considered and rejected, this same argument in *Lissner v. Pierview, LLC* (2001) AB-7650. The same response is appropriate here:

> We must reject appellant's contentions. Appellant is arguing about things that have not happened yet and may never happen. In addition, notice is provided to the community, at least technically, because §23803 provides that written notice of the intention to remove or modify a condition must be given to "the local governing body of the area in which the

premises are located." This body then has 30 days to object to the modification or removal of the condition, and, if an objection is filed, the Department must hold a hearing. Appellant's remedy, if a petition should be filed at some time to modify or remove conditions, lies with the local governing body.

ORDER

The decision of the Department is affirmed.[3]

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

[3]This 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.