

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

AB-8137

File: 47-368798 Reg: 03054444

OLD TOWN FRED'S, LIMITED PARTNERSHIP, dba Fred's Mexican Café
2470 San Diego Avenue, Suite 105, San Diego, CA 92110,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED MAY 17, 2004

Old Town Fred's, Limited Partnership, doing business as Fred's Mexican Café (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied its petition for modification of two conditions on its on-sale general public eating place license.

Appearances on appeal include appellant Old Town Fred's, Limited Partnership, appearing through its counsel, William R. Winship, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated May 15, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Nine conditions were imposed on appellant's license after protests were filed against its original license application. Appellant later petitioned the Department for modification of two of the nine conditions, but the Department denied the request on January 24, 2003. Appellant requested a hearing, which was held on April 8, 2003. At the hearing, documentary evidence was received, and testimony was presented by Department investigator Tannie Kelpin; nearby residents Christal Palmer, Penny Palmer, and Thomas Doyle; and by Kenneth Lovi and Clement Martineau, appellant's managing partner and on-site manager, respectively.

Appellant operates a small Mexican restaurant in San Diego's Old Town area, a popular tourist destination visited by several million people each year. The premises shares a common courtyard with two other licensed premises: Hemingway's, a cigar bar that sells beer and wine, and D'Lish, a sports bar.

When appellant originally applied for a license for the premises, protests were filed by several nearby residents, but the protests were withdrawn when appellant agreed to nine conditions. The conditions prohibit:

- Live entertainment
- Dancing
- Sale and consumption of alcoholic beverages in the patio area other than between 9:00 a.m. and midnight each day
- Audible noise disturbing to nearby residents
- Music in the outdoor dining area other than between 10:00 a.m. and 10:00 p.m. Sunday through Thursday and between 10:00 a.m. and midnight on Friday and Saturday
- Sale and consumption of alcoholic beverages in the outdoor dining area unless food service is available upon request
- Sales of alcoholic beverages for consumption off the premises
- Quarterly gross sales of alcoholic beverages exceeding gross sales of food during the same period
- Exchange of the license for a public premises license or operation as a public premises

Appellant seeks to modify the condition prohibiting live entertainment to allow a traditional, non-amplified mariachi group inside the premises between 11:00 a.m. and 9:00 p.m. each day of the week. It also requests extending the sale and consumption hours on the patio by one hour, until 1:00 a.m. each day of the week.

At least five residences are within 100 feet of the premises or its parking lot, and when contacted by a Department investigator, the residents objected to the proposed modifications. The Immaculate Conception Catholic Church is located about 440 feet from the premises. Although the church protested the original issuance of the license, it did not respond when contacted regarding modification of the conditions.

The Department denied the requested modification because residences are still located within 100 feet of the premises or its parking lot. The residents there objected to the modifications and stated they are currently disturbed by patrons of the premises on the patio and as they leave the premises.

Subsequent to the hearing, the Department issued its decision which determined that appellant had not shown that the grounds which caused the imposition of the conditions no longer existed, and the petition to modify conditions was denied.

Appellant has filed a timely appeal contending that there have been major changes in the circumstances that led to the original imposition of conditions and that the changes requested are minimal.

DISCUSSION

The Department may impose "reasonable conditions" on a license under the authority of Business and Professions Code² section 23800, subdivision (a), which

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

provides that "If 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" the Department may grant the license subject to those conditions. Section 23801 states that the conditions "may cover any matter . . . which will protect the public welfare and morals"

Section 23803 provides that the Department may remove or modify conditions on a license "if it is satisfied that the grounds which caused the imposition of the conditions no longer exist."

The petition for conditional license listed the reasons for imposition of the conditions as a protest filed by the San Diego Police Department; an undue concentration of licenses in the census tract; a high crime rate; residences within 100 feet of the premises or its parking lot; and a "consideration point" (a church) within 600 feet of the premises or its parking lot. However, at the hearing regarding modification of the conditions, Department investigator Kelpin testified that the premises had mistakenly been placed in the wrong census tract and crime-reporting district when appellant originally applied for its license. When the correct census tract and crime-reporting district are used, the premises is not now, and never was, located in an area of undue concentration or high crime.

A number of structural changes have been made which, appellant contends, should "substantially eliminate any residential concerns." (App. Br. at p. 4.):

- The rear wall of the common courtyard, behind which is the parking lot and then the residents' property, has been enlarged.
- A wooden and glass wall has been constructed along the east side of appellant's patio, enclosing that side of the patio which is closest to the residents.
- Additional restroom facilities have been constructed away from the area near the residents' property, reducing the noise from patrons

- congregating there while waiting to use the restroom.
- The courtyard patio, which serves all three licensed premises in the complex, has been covered to reduce the transmission of noise.
- The parking lot abutting the residents' property is no longer available for public parking.

Appellant urges that the Department has admitted that undue concentration and high crime never existed and were improperly used to impose conditions. Because these two grounds do not, and never did, exist, appellant argues that the Department "cannot now assert that grounds do not exist to minimally modify" the conditions.

To have conditions on a license removed or modified, a licensee must satisfy the Department that the grounds which caused the imposition of the conditions in the first place *no longer exist*. In the present case, two of the grounds, undue concentration and high crime, have been shown not to exist. This still leaves, however, the ground that the premises or its parking lot is located within 100 feet of residences.

While it is conceivable that a situation might arise in which some other changes might occur that would justify the removal of conditions even though there still existed residences within 100 feet of a licensed premises, this is not that case.

Here, in spite of modifications made by appellant, the residents who originally protested are still opposed to conditions more liberal than those originally agreed to by appellant. They contend that they are still disturbed by noise from the premises in spite of the modifications made by appellant. Under the circumstances, the Department is not satisfied that the grounds for imposition of the original conditions no longer exist. We cannot say that the Department has abused its discretion in refusing to allow the conditions to be modified.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
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.