

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

AB-8202

File: 47-395188 Reg: 03054973

RICHARD CUEVAS,
Appellant/Protestant

v.

VALENCIA ORANGES II, INC. dba Hotel Valencia
355 Santana Row, San Jose, CA 95128
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 8, 2004

Richard Cuevas, appellant, appeals from a decision of the Department of Alcoholic Beverage Control¹ which denied his protest against the application of Valencia Oranges II, Inc., dba Hotel Valencia, for the fiduciary transfer of a bona fide public eating place license.

Appearances on appeal include Richard Cuevas, representing himself; Richard Cole, counsel for Valencia Oranges II, Inc.; and Dean Lueders, counsel for the Department.

FACTS AND PROCEDURAL HISTORY

The premises which is the subject of this appeal is a hotel located in the upper five floors of a block-square building in a redevelopment project of the City of San Jose.

¹ The decision of the Department, dated October 9, 2003, is set forth in the Appendix.

The project is called Santana Row, and consists of eight city-block-square buildings ranging from one to seven stories in height. The project includes other restaurants and retail establishments, and residences which apparently were still under construction at the time of the licensing investigation. The hotel occupies floors three through seven. It has a restaurant and bar on the third floor, and a bar on its top floor. Guest rooms will be on floors four through seven. The guest rooms contain or will contain closed access cabinets ("mini-bars") under a separate license.

The applicant has been operating with an interim operating permit while its application and petition for conditional license has been processed. The petition for conditional license contains eight conditions:

- 1. The premises shall be maintained as a bona fide food restaurant and shall provide a menu containing an assortment of foods normally offered in such restaurants.*
- 2. The subject alcohol beverage license shall not be exchanged for a public premises type license nor operated as a public premises.*
- 3. The sale of alcohol for consumption off the premises is strictly prohibited.*
- 4. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee(s) as depicted on the ABC-257 dated 9/11/02 and ABC-253 dated 9/11/02.*
- 5. The petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control, as depicted on the ABC-257 dated 9/11/02 and ABC-253 dated 9/11/02.*
- 6. Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 9/11/02 and ABC-253 dated 9/11/02.*
- 7. Trash shall not be emptied into outside trash containers between the hours of 10:00 p.m. and 7:00 a.m.*
- 8. Trash pickup at the premises will be made no earlier than 7:00 a.m. nor later than 10:00 p.m.*

The premises are located in a high crime area and an area of overconcentration (five licenses authorized, ten issued, and seven applications pending, in addition to the one at issue.) Applicant submitted, and the Department found sufficient (Finding of Fact X), a letter explaining the reasons for a public convenience and necessity exception to the issuance of an additional license (Business and Professions Code section 23958.4, subdivision (b)(2).)

Department investigator Matthew McCabe testified that he conducted the licensing investigation, consulted with nearby residents, examined the Santana Row complex, considered the objections which had been raised, and concluded his investigation by recommending that the license be issued.

Richard Cuevas, the sole protestant, resides at 382 South Redwood Avenue, 393 feet from the premises. Cuevas was 41 years of age at the time of the administrative hearing, had lived at the Redwood Avenue address five years, was married and was the father of two young children. Cuevas was represented by counsel at the administrative hearing.

The ALJ construed Cuevas' letter of protest to raise three issues: issuance of the license will create or aggravate a traffic problem in the area; the proposed premises is in or near a residential area and will interfere with the residents' quiet enjoyment of their property due to increased parking or traffic; granting of the license would be contrary to welfare and morals. [RT 11-12.] After a review of the evidence, the ALJ concluded that none of the grounds of the protest had been established.

In his letter brief, Cuevas asserts that residents within 500 feet of the Hotel Valencia experience noise beyond midnight from traffic and people, and urination on their property. He also complains that the public had no access to complain about

licensing for “the entire 40 acre site.”

DISCUSSION

It is readily apparent that the major impact on Cuevas and other residents of the area is from the Santana Row project of the City of San Jose, and not from the Valencia Hotel, and Cuevas’s letter brief bears this out. He contends the public “did not have access to protest any of the licensing for the entire 40 Acer [sic] site was closed to the public.” It is not clear what he means by this, since he obviously is protesting the license sought by the Valencia Hotel.

The problem with protestant Cuevas’s letter brief is that it fails to connect any of the problems about which he complains with the operation of the hotel. There can be little doubt that a major redevelopment area will have an impact on nearby residents, but there is little or no evidence that impact can legitimately be blamed on the operation of the Valencia Hotel.

The hotel’s restaurant is on the third floor, as is a lounge with a fixed bar, and an outside bar on the seventh floor. There appears to be no street level operation involving the sale of alcohol in the hotel, although a witness on behalf of protestant testified that he observed as many as 150 people waiting on the sidewalk to be admitted to the third floor bar.

Cuevas testified that he experienced no parking or traffic problems prior to the construction of Santana Row, One of the parking lots of Santana Row is within 50 feet of his residence. It is the farthest from the proposed premises, and is said by Cuevas to be the primary source of the bothersome late night noise.

The ALJ summarized the evidence this way:

Assuming, however, that it is a lot available to patrons of the proposed premises,

the evidence shows that the Department has exercised its discretion, based upon the operation of the business and the conditions petitioned for by the applicant, that the applicant has established the operation of its business will not interfere with the quiet enjoyment of the property by residents.⁴

⁴ Title 4, California Code of Regulations, Rule 61.4(b).

Protestant's residence is not located within 100 feet of the proposed premises, so he is not in a position to claim the protection offered by Rule 61.4. The burden remains his to establish that the operation of the proposed premises will unduly interfere with his quiet enjoyment of his property, and he has not satisfied that burden.

It is readily apparent that the City of San Jose, by its sponsorship of the Santana Row development, has made a policy decision calculated to benefit the city as a whole, albeit at some expense to nearby residents. It is also apparent that the Department, in its wide discretion, has reached a similar conclusion. We cannot say it has abused that discretion.

We are guided by the leading case of *Sepatis v. Alcoholic Bev. Control Appeals Bd.* (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729], where the court stated, quoting from *Koss v. Dept. of Alcoholic Bev. Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219 :

“[T]he department exercises a discretion adherent to the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. ... Where the decision is the subject of a choice within reason, the department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the appeals board or the court may not interfere therewith. [Citations.] Where the determination of the department is one which could have been made by reasonable people, the appeals board or the courts may not substitute a decision contrary thereto, even though such decision is equally or more reasonable in the premises.”

We have considered the remainder of appellant's arguments, and find none which compels a different result.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.