

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

AB-8268

File: 21-402360 Reg: 03056069

LUIS BENEVIDEZ, et al., Appellants/Protestants

v.

AYAD WANIS, dba Village Market
47955 90th Street West, Lancaster, CA 93536,
Respondent/Applicant,

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: February 3, 2005

Rehearing: May 5, 2005

Los Angeles, CA

ISSUED JULY 6, 2005

Luis Benevidez, et al. (appellants/protestants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of Ayad Wanis, doing business as Village Market (respondent/applicant), for the person-to-person and premises-to-premises transfer of an off-sale general license.

Appearances on appeal include appellants/protestants Luis Benevidez, Dave Christensen, Heather Collins, Kenneth Doty, Patricia Doty, Shirley Dudley, William Dudley, Shirley Ferry, Pat Fitzgerald, Marina Grandbois, John C. Houston, Mike Ismail, Cheryl James, Robert Kerekes, Brenda R. Levenson, Don Miller, Kimberly Miller, Florabelle Miracle, William Miracle, Carol Prenosil, Oscar Romero, Deborah A. Ruffino,

¹The decision of the Department, dated March 4, 2004, is set forth in the appendix.

Diana Rundle, James Rundle, Loretto R. Trahan, and Vern Trahan, appearing through their counsel, Michael B. Levin; respondent/applicant Ayad Wanis, appearing through his counsel, Andreas Birgel, Jr.; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Applicant petitioned for issuance of an off-sale general license. Protests were filed by appellants (and others), and an administrative hearing was held on December 23, 2003. At that hearing, oral and documentary evidence was presented concerning the application and the protests.

Subsequent to the hearing, the Department issued its decision which denied appellants' protests, dismissed the protests of the protestants who did not appear, and allowed the license to issue.

Appellants filed an appeal making the following contentions: 1) Relevant evidence was improperly excluded at the hearing, and 2) the findings were not supported by substantial evidence in light of the whole record. The second issue is closely tied to the first, so they will be discussed together.

DISCUSSION

Appellants contend that evidence of crime statistics was improperly excluded at the hearing. Protestant Loretto Trahan testified that she had asked for, and received, crime statistics for the local area from the sheriff's office. [RT 63.] She could not remember how much alcohol-related crimes had increased in the last year, but said that looking at her "file" would refresh her recollection. After reviewing a document she called "crime stats," she was prevented from testifying about the number of incidents recorded on that document when the objection by applicant's counsel was sustained.

On appeal, appellants contend that the testimony about the crime statistics should have been allowed in as administrative hearsay.

Government Code section 11513, subdivision (b), provides that, in administrative hearings, relevant evidence should be admitted as long as it is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513, subd. (c).) "Administrative hearsay" may be used to supplement or explain other evidence, but if a timely objection to the hearsay is made, it is not sufficient to support a finding. (Gov. Code, § 11513, subd. (d).)

We conclude that appellants' contention should be rejected. First, at the hearing, appellants did not contend that the testimony, or the document underlying it, should be admitted as administrative hearsay. Counsel said he was not intending to have the document admitted, so he did not need to lay any foundation for its admission; he only wanted the witness to refresh her recollection by looking at the document. Since admission of this evidence as administrative hearsay was not raised at the hearing, appellants are not entitled to raise it for the first time on appeal.

Secondly, even if this evidence were admitted as administrative hearsay, appellants have not told us what evidence it would supplement or explain. Appellants wanted to present testimony regarding "an increase in alcohol-related incidents." [RT 63.] The only other evidence of crime statistics was that presented by the Department investigator, when he was asked if he had looked at "the high crime component of Section 23958.4." He replied that the premises is in a low crime reporting district.

Section 23958.4 deals with specific crime statistics for the specific purpose of determining whether the premises is located in an area of "undue concentration." A "high crime" reporting district is one which "has a 20 percent greater number of reported

crimes, as defined in subdivision (c), than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency." (Bus. & Prof. Code, § 23958.4, subd. (a)(1).) The "reported crimes" used for these statistics are "reported offenses of criminal homicide, forcible rape, robbery, aggravated assault, burglary, larceny, theft, and motor vehicle theft, combined with all arrests for other crimes, both felonies and misdemeanors, except traffic citations." (Bus. & Prof. Code, § 23958.4, subd. (c)(2).) Statistics for other types of crimes for an undefined area not necessarily congruent with law enforcement's "crime reporting district," are not relevant to the section 23958.4 computations.

In their protests, appellants raised the issues of increased sale-to-minor violations and increased drunk driving incidents. The evidence appellants wished to present could reasonably be regarded as supplementing or explaining other admissible evidence about those types of crimes. However, appellants did not present any other admissible evidence about sales to minors or drunk driving, and they disavowed the intention to offer the document on which the testimony was to be based as evidence.

We do not believe this evidence was improperly excluded.

The second, or subsidiary, contention raised by appellants on appeal is that finding 10 "is not supported by substantial evidence in light of excluded evidence of rising crime to establish an impact of alcohol sales on school-age children." Finding 10 deals with the bus stop across the street from the premises and concludes there was no evidence of any impact that issuance of the license might have on students getting on or off at the bus stop. Appellants' contention is dependent on a determination that their crime statistics were improperly excluded. Since we have concluded that the evidence was *not* improperly excluded, we necessarily reject this contention.

ORDER

The decision of the Department is affirmed.²

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.