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

AB-8313
File: 41-400625 Reg: 04056821
MILDRED M. CARLTON, Appellant/Protestant

v.

VH NOODLE HOUSE, INC., dba VH Noodle House
3288 Pierce Street, B101, Richmond, CA 94804,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 7, 2005
San Francisco, CA

ISSUED JUNE 20, 2005

Mildred M. Carlton (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control[1] which granted the application of VH Noodle House, Inc., doing business as VH Noodle House (respondent/applicant), for an on-sale beer and wine eating place license.

Appearances on appeal include appellant/protestant Mildred M. Carlton, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated July 1, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On May 19, 2003, applicant petitioned for issuance of an on-sale beer and wine eating place license, with conditions imposed on the license. The Department approved issuance of the license, but appellant filed a protest,[2] and an administrative hearing was held on June 8, 2004. At that hearing, oral and documentary evidence was presented concerning the application and the protest.

The proposed premises is a restaurant serving Chinese and Vietnamese cuisine, located in a shopping center in Richmond. The restaurant seats 50 patrons, serves full meals, and does not provide entertainment other than radio music. There are eight restaurants in the shopping center, four of which hold alcoholic beverage licenses. Three of the licensed restaurants serve Chinese food and the fourth serves Thai food.

Based on crime statistics provided by the Richmond Police Department, the Department determined that the reporting district in which the proposed premises is located is not an area of undue concentration as defined in Business and Professions Code[3] section 23958.4, subdivision (a)(1). However, the Department determined that the proposed premises is located in an area of undue concentration as defined in section 23958.4, subdivision (a)(2). On the basis of the population in the census tract, five retail licenses are authorized, but 14 already exist in the census tract. Although the proposed premises is located in an area of undue concentration, the Department had

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[2]The Richmond Police Department also filed a protest, but it was withdrawn after the applicant filed a petition for conditions to be imposed on the license.

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

determined that public convenience or necessity would be served by issuance of the license, as provided in section 23958.4, subdivision (b)(2).

Subsequent to the hearing, the Department issued its decision denying appellant's protest and allowing the license to issue. Appellant then filed an appeal contending that the Department erred in finding that the premises is not in a "high crime area" and in concluding that public convenience or necessity would be served by issuance of the license.[4]

DISCUSSION

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 nevertheless issue a license "if the applicant shows that public convenience or necessity would be served by the issuance." (Bus. & Prof. Code, §23958.4, subd. (b)(1).)

It is undisputed that the proposed premises is located in an area of undue concentration as defined in section 23958.4, subdivision (a)(2).[5] However, appellant, at

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[4] In its reply brief, the Department alleges for the first time that appellant's appeal was not timely filed. However, the Department errs in stating the appeal was filed on August 13, 2004, three days after the end of the statutory appeal period. The appeal was timely filed on August 10, 2004, when the Board received a by facsimile copy of the appeal and the original was sent by registered mail. (See Bus. & Prof. Code, § 23081.5.)

[5]Section 23958.4, subdivisions (a)(1) and (a)(2), provide:

> (a) For purposes of Section 23958, "undue concentration" means the case in which the applicant premises for an original or premises-to-premises transfer of any retail license are located in an area where any of the following conditions exist:
>
> (1) The applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, as defined in

the hearing and again in this appeal, insists that the Department used the wrong data for determining undue concentration under the "crime statistics" provision of subdivision (a)(1) of section 23958.4, resulting in the Department's erroneous conclusion that this is not a "high crime area."

Appellant misapprehends the alternate tests used to determine undue concentration under section 23958.4, subd. (a). It appears that she is treating subdivision (a)(1) as defining an "undue concentration of crimes" and subdivision (a)(2) as defining an "undue concentration of licenses." In fact, both subdivisions define undue concentration "for purposes of Section 23958," which speaks of only "an undue concentration of licenses."

Subdivision (a)(2) seems more directly related to an undue concentration of licenses, since it involves computing and comparing ratios of licensed premises to population in a census district; however, it is only one way of determining whether a proposed premises is in an area of undue concentration for purposes of section 23958. Subdivision (a)(1) is an alternate method of determining whether a proposed premises is in an area of undue concentration for purposes of section 23958.

Even if the Department had used the statistics appellant wanted, and had determined that the area met the criteria for subdivision (a)(1), it would have added nothing to the analysis of whether the license should or should not have been granted.

> 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.
>
> (2) As to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located.

The issue would still have been simply whether public convenience or necessity existed that would allow the Department to issue a license in spite of the proposed premises being located in an area of undue concentration of licenses.

Appellant's concern is that the Department determined that the area in which the proposed premises is located was not a "high crime area." However, "high crime area" is merely Department parlance for an area that has an undue concentration of licenses as determined under the formula in subdivision (a)(1) of section 23958.4. Appellant appeared to believe that she had raised an issue about the incidence of crime in the area when she referred to subdivision (a)(1), but she had merely asserted an additional reason for considering the area to have an undue concentration of licenses. Since the Department and the applicant conceded that the area was one of undue concentration as determined under subdivision (a)(2), alleged errors in the computation pursuant to subdivision (a)(1) were irrelevant and superfluous. Therefore, the administrative law judge (ALJ) was correct in rejecting appellant's attempt to introduce her own compilation of crime statistics.

Appellant's primary contention is that the Department erred in finding that public convenience or necessity would be served by issuing this license, and therefore, applicant did not qualify for issuance of the license as provided in section 23958.4, subdivision (b). In essence, appellant is arguing that substantial evidence does not support the finding.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (positions of both Department and license applicant supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Undue concentration is addressed in Findings of Fact VI through X of the Department's decision:

> VI - As conceded by applicant, there is an undue concentration of licenses in the area. The evidence shows that the proposed premises is in Census Tract 3830. The population of this tract is 4,486. The number of retail licenses authorized therein is 5. Currently, there are 14. Under Section 23958.4(a)(2), an undue concentration of licenses exists in this census tract.
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> VII - The proposed site is within the jurisdiction of the Richmond Police Department. Information obtained from said agency indicates it has 15 crime reporting districts or beats. The most recent crime statistics from the agency at the time of the application indicates [sic] that the average

number of offenses reported per district was 2,193. The total offenses reported from the district of the proposed premises was 2,389. 120% of the average number of offenses per district was 2,631. The proposed premises is not in a high crime reporting district under Section 23958.4(a)(1).

VIII - The Richmond Police Department filed a protest against this application on August 12, 2003. Said protest was withdrawn following applicant's petition for conditions.

IX - Applicant informed the Department's investigator that it was losing business because its patrons wanted to complement their meals with alcoholic beverages. The investigator visited other Asian restaurants in the mall. There are a total of eight such restaurants, though of these only four have beverage licenses. The investigator centered her investigation on what makes applicant's operation different from those that are licensed. She visited the other licensed restaurants and obtained their respective menus. Based upon the menus and her observations, she concluded that applicant's operation offered two different styles of cuisine where as [sic] the others offered only one style. On that basis plus the conditions sought by applicant, the investigator concluded, and the Department determined, that issuance of the license would serve public convenience and necessity. The evidence does not show that the Department acted arbitrarily or capriciously in so determining.

X - While it is true that there is an undue concentration of licenses in the area, the evidence shows that issuance of the license will serve public convenience and necessity. [Fns. omitted.]

Appellant argues that the finding of public convenience or necessity was erroneous because the Department investigator, not the applicant, established that public convenience or necessity existed. The applicant initially indicated only that the restaurant would lose business without a license and that its clientele had requested alcoholic beverages. When the investigator asked what made this restaurant different from the others nearby, the applicant pointed out that both Chinese and Vietnamese food were offered on the menu. [RT 29.]

The investigator visited the other nearby licensed restaurants and obtained menus from each. She determined that none of the licensed restaurants served Vietnamese food, and that applicant's restaurant was the only one that offered more than one ethnic

cuisine. The investigator recommended granting of the license, with conditions, and the Department adopted her recommendation.

Appellant's contention that it must be the applicant who provides all the evidence of public convenience or necessity, would have the Department, and this Board elevate form over substance. The Department is obligated to conduct a "thorough investigation" and must consider all the factors that come to its attention during the investigation, regardless of whether they are pointed out by the applicant or a protestant or are discovered by the Department investigator. In the present case, the applicant, according to the investigator's testimony, asserted all the factors the Department used in making its determination, and the investigator was able to confirm them during her investigation.

Appellant also argues in her brief that *Sepatis v. Alcoholic Beverage Control Appeals Board* (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729] (*Sepatis*) established that the term "public convenience or necessity" has no legal definition, and no finding can be made regarding a term that is undefined. She rejects as "hog wash" the court's reliance on the established rule of statutory construction "to construe apparently contradictory provisions in such a way as to achieve harmony rather than hold that there is an irreconcilable inconsistency." (*Id.*, at p. 98.)

The protestant in *Vogl v. Bowler* (1997) AB-6753 (*Vogl*), made a contention similar to the one appellant makes here, asserting that the Department's action in that case was arbitrary and capricious because it had failed to provide any standard for judging what met the requirement of “public convenience or necessity.” The protestant in *Vogl* relied on the following language from *Sepatis*, *supra*, and we assume that appellant in the present case bases her contention on this language as well:

> The real problem stems from the fact that neither the statute nor the Department's rules contain any definition of the term "public convenience or necessity" as that term is used in section 23958, nor do they indicate just what criteria (apart from criteria relevant to determination of "undue concentration") are denoted by that concept.

(*Sepatis*, *supra*, at p. 99.)

The Appeals Board rejected the contention made by the protestant in *Vogl*, *supra*, and we quote several paragraphs from that case as they are equally applicable in the present case:

> What protestant ignores here is the language following that just quoted [*ante*, from *Sepatis*]:
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> > "And case law from other contexts provides scant guidance. The Supreme Court has observed that the phrase 'public convenience *and* necessity' (arguably more restrictive because of the conjunctive) 'cannot be defined so as to fit all cases. . . . [Its] meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found.' (*San Diego etc. Ferry Co.* v. *Railroad Com.* (1930) 210 Cal. 504, 511-512 [292 P. 640].)"
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> (Sepatis, supra.)
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> The language from San Diego Ferry Co. quoted above points up the inherent impossibility of providing a universally applicable "definitive definition" of a context-sensitive term like "public convenience or necessity."
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> ¶ . . . ¶
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> The court [in *Sepatis*] then declined to provide a "definitive" definition of "public convenience or necessity," finding it unnecessary in light of the discretion accorded the Department in deciding whether or not issuance of a license would be contrary to public welfare or morals:
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> > " '[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 upon the same subject. . . . Where the decision is the subject of 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. [Citations.]'"

(Sepatis, supra, at 102, quoting Koss v. Dept. Alcoholic Beverage Control (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr. 219].)

We will follow the reasoning of the court in Sepatis. While a "definitive" definition of "public convenience or necessity" might be helpful in some instances, a lack of one does not make the Department's decision arbitrary and capricious, as long as it is one within reason. The fact that it "does not meet the standards the protestants would choose" (App. Reply Br. at 9) does not mean that there are "no standards susceptible of meaningful review for invoking the exception." The standard to which the Department must adhere in determining public convenience or necessity is "the standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion upon the same subject." (Sepatis v. Alcoholic Beverage Control Appeals Board (1980) 110 Cal.App.3d 93, 102 [167 Cal.Rptr. 729] quoting Koss v. Dept. of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489, 495 [30 Cal.Rptr. 219].) The Department has adhered to that standard in this case.

In the present appeal, the ALJ explained the application of the law to the facts in Determination of Issues VI:

> In her protest, protestant urges that Sections 23958 and 23958.4 require the Department to deny an application if undue concentration is established. Section 23958.4(b)[(1)] provides an exception to this mandate. The Legislature has authorized the Department to exercise its own judgment in determining if public convenience and necessity will be served by issuance of the license when the application is for a bona fide public eating place license. The Department, exercising its discretion granted under section 23958.4(b)[(1)], did so and made such determination. Protestant disagrees with the Department's determination. "If reasonable minds might differ . . ." as to the propriety of the Department's action, ". . . this fact serves to fortify the conclusion that the Department has acted within the area of its discretion" (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594). As found hereinabove (Finding IX), the evidence shows that the Department has not abused its discretion in so doing.

We agree with the ALJ that the Department did not abuse its discretion in finding that public convenience or necessity existed in this case.

ORDER

The decision of the Department is affirmed.[6]

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

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[6]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.