

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

AB-8419

File: 47-410742 Reg: 04058227

ROGER HUANG, Appellant/Protestant

v.

34 MASON STREET LLC, dba Blue Cube/Music Incubator
34-38 Mason Street, San Francisco, CA, 94102,
Respondent/Applicant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 5, 2006
San Francisco, CA

ISSUED: FEBRUARY 9, 2006

Roger Huang (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ which granted the application of 34 Mason Street LLC, doing business as Blue Cube/Music Incubator (respondent/applicant), for an on-sale general public eating place license.

Appearances on appeal include appellant/protestant Roger Huang, appearing through his counsel, David M. Marquez and Lisa M. Carvalho; respondent/applicant 34 Mason Street LLC, appearing through its counsel, Mark E. Rennie; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

¹The decision of the Department, dated March 10, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Applicant applied for the person-to-person and premises-to-premises transfer to it of an on-sale general public eating place license. Verified protests were filed by appellant and by the San Francisco Police Department. Applicant filed a petition for conditional license (Ex. 2) imposing 16 conditions on the license, restricting its operation to ensure it operates as a bona fide public eating place; prohibiting the sale of alcoholic beverages for consumption off the premises; limiting noise; and requiring security guards and patron parking spaces. Upon applicant's agreement to the conditions, the San Francisco Police Department withdrew its protest. At the January 20, 2005, administrative hearing on the remaining protest, documentary evidence was received and testimony was presented concerning the Department's investigation of the application, the protest issues, and the operation of the proposed premises.

The Department's decision denied appellant's protest, and appellant filed an appeal making the following contentions: Issuance of the license would add to an existing undue concentration of licenses and public convenience or necessity would not be served by issuing this license, and issuing the license would be contrary to public welfare and morals.

DISCUSSION

I

Business and Professions Code² section 23958 provides that the Department "shall deny an application for a license if issuance . . . would result in or add to an

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

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 both subdivisions (a)(1) and (a)(2) of section 23958.4.³

The decision describes the proposed premises and its operation in Findings of Fact (FF) IV through VI:

IV. The proposed premises is a three-story building, plus basement, on the east side of Mason Street between Eddy and Turk Streets in San Francisco. The surrounding area is mixed commercial/residential. The entire building, including the basement, will be licensed. The basement consists of restrooms, employee lockers and lounge, and storage space. The ground floor is the main entertainment area where art displays, live entertainment and performance art will be accommodated. It also contains a kitchen that complies with Section 23038 and a dining area. There is a large dining room on the second floor where performances can also be staged. Applicant received a permit to construct an enclosed ventilated sound-proofed smoking room with a glass wall on the second

³Subdivisions (a)(1) and (a)(2) of section 23958.4 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 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.

floor wherein patrons may use tobacco products without congregating on the sidewalk in front of the premises. The third floor consists of office space otherwise known as the arts and music educator or music incubator. This area is designed for use by individuals seeking to stimulate arts, entertainment, politics and business throughout the city and increase diversity in educational activities in the city. A stairway connects all floors.

V Applicant received an interim retail permit from the Department on October 15, 2004. Since then, the proposed premises has presented at least three art shows and has generated no known complaints to the Department. Its planned hours of operation are from 11:00 a.m. to 2:00 a.m. according to the nature of its programs. It is applicant's expectation that its events will attract tourists and local community members to attend and exchange their political thoughts and ideas. Applicant employed the services of a leading sound engineering consultant to help create a sound envelope preventing noise, including live music, from escaping the interior of the premises. The building itself has three feet of masonry and double-paned windows.

VI This site was licensed previously with an on-sale general public eating place license from September 1991 to May 1996. The Department's records indicate that the site suffered one disciplinary action. Records pertaining to this site have been expunged, and the evidence does not show the nature of the violation or extent of the discipline imposed. The proposed premises complies with local zoning requirements. A conditional use permit is not required. The evidence does show that there is one consideration point within 600 feet of the proposed premises, namely, Glide Memorial Church. Though contacted about the application by the Department, no response was received.

The circumstances regarding undue concentration and public convenience or necessity are addressed in the decision in FF VII through IX:

UNDUE CONCENTRATION

VII The proposed premises is in Census Tract No. 0125, which has a population of 7,727. The number of on-sale licenses authorized in this tract is 25. There currently are 39 such licenses in existence. The evidence shows, and there is no dispute, that an undue concentration of licenses exists in this census tract.

VIII Applicant submitted a "public convenience and necessity" letter to the Department describing its intended operation. According to applicant, the premises will operate as a moderately priced restaurant and

entertainment venue catering to conventioners, corporate event attendees and private citizens. Entertainment will include art shows, disc jockeys and a variety of music reflecting the taste and cultural background of those booking an event. Applicant asserts that a similar milieu is non-existent currently in the Tenderloin district and that it will be the only licensed premises offering a conversazione venue in the area.

IX The Department, exercising the discretion granted it by the legislature under Section 23958.4(b)(2), concluded that, though there is an undue concentration of on-sale retail licenses in the area, applicant established that public convenience and necessity would be served by issuance of the license as conditioned. The evidence does not show that the Department has abused its discretion.

The basic issues to be considered by the Appeals Board "are whether the Department's findings of fact are supported by substantial evidence and whether the decision based thereon constitutes an abuse of discretion." (*Koss v. Dept. Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 492 [30 Cal.Rptr. 219].)

The Court of Appeal in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826], explained the limited review of Department decisions in which appellate tribunals, including this Board, may engage:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, supra*, 100 Cal.App.4th at p. 1254; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

Since there is no dispute that the proposed premises is located in an area of undue concentration, and issuance of the license would, apparently, add to that undue concentration, the only real issue on appeal in this regard is whether the Department abused its discretion in concluding that public convenience or necessity will be served by issuing the license. Appellant contends that the Department erred in reaching this conclusion because the proposed premises is located in an area which not only meets the criteria for undue concentration, but exceeds them, with reported crime in the Tenderloin district almost 10 times the relevant average and 39 licensed premises instead of the 25 allowed under the population formula.

In *Sepatis v. Alcoholic Beverage Control Appeals Bd.* (1980) 110 Cal.App.3d 93 [167 Cal.Rptr. 729] (*Sepatis*), the Department granted an application for an on-sale license even though there was already an undue concentration of licenses under the formula of section 23598, subdivision (a)(1). The Department determined that public convenience or necessity would be served by issuance of the license because the proposed premises would be of a different character than existing bars and would appeal to all segments of the community, including persons in the area who were reluctant to enter other bars in the neighborhood. The Appeals Board reversed the decision on the ground that "public convenience or necessity" related only to availability of alcoholic beverages and the Department could not consider other factors such as the physical appearance, aesthetics, or of whether the applicant would cater to a particular segment of the public. The applicant petitioned for review of the Board's order, and the court of Appeal reversed. The court reasoned that since section 23958 authorizes issuance of licenses on a showing of public convenience or necessity even though issuance would result in or add to an undue concentration of licenses, "public

convenience or necessity" must be based on criteria different from those involved in a determination of "undue concentration" (*Ibid.* at p. 98).

Appellant's argument ignores both the statute allowing issuance of a license in spite of undue concentration and the discretion with which the Department is endowed. In *Sepatis, supra*, the court described the scope of the Department's discretion by quoting from *Koss v. Dept. Alcoholic Beverage Control, supra*, 215 Cal.App.2d 489, 496:

"the 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.]"

In Determination of Issues VI, the decision addresses the Department's discretion and appellant's attack on the Department's finding of public convenience or necessity:

The legislature has granted the Department the discretion to determine whether or not issuance of the license will serve public convenience or necessity (Section 23958.4(b)(2)). If the Department concludes that public convenience or necessity will be served, it may approve the issuance notwithstanding the undue concentration in the area. In this matter, the Department so concluded based upon the nature of the planned operation, the conditions imposed on the license and discussions with the local law enforcement authority. Protestant urges that public convenience or necessity will not be served because most of the inhabitants of the Tenderloin area will not be attracted to the offerings of applicant. This assertion was not established by the evidence.

Given the record in this matter, we cannot say that the Department abused its discretion in finding that public convenience or necessity existed, allowing it to issue the applied for license in spite of the existence of undue concentration.

II

Appellant contends that issuance of this license would be contrary to public welfare and morals because "Each new license threatens to add another layer to the chronic burdens of vice and criminal predation that plague the community." The substantial evidence in this record, according to appellant, shows good cause for denying this license, not granting it.

The California Constitution, article XX, section 22, provides that the Department has "the power, in its discretion, to deny . . . any specific alcoholic beverages license if it shall determine for good cause that the granting . . . of such license would be contrary to public welfare and morals."

We cannot deny that many reasonable people might agree that San Francisco's Tenderloin does not need more establishments that sell alcoholic beverages. Appellant is in this category, objecting, on general principles, to issuance of *any* alcoholic beverage license in this area.

The Department however, is constitutionally required to look at the effect on public welfare and morals of *this particular license*. The Department has followed this directive and concluded, based on the evidence presented, that it would not be contrary to public welfare and morals to issue this license. It investigated and considered appellant's protest and found that the evidence did not support the bases of appellant's protest: undue concentration exists, but there is substantial evidence that public convenience or necessity would be served by issuance of this license; although crime in the area is high, there is substantial evidence that this premises, operating within its conditional license, will not create or aggravate a law enforcement problem; and,

although the proposed premises is within 100 feet of residences, substantial evidence exists to support the finding that the premises, operating within its conditional license, will not interfere with its nearby residential neighbors.

It would be easy to imagine premises that would not serve public convenience or necessity, that would create or aggravate a law enforcement problem, and that would interfere with nearby residents. The Department has decided that this particular licensed premises, assuming it operates under the conditions to which it has agreed, will not cause these problems. Opinions may differ, but on this evidentiary record we cannot say the Department abused its discretion in making this decision.

Turning again to *Sepatis, supra*, 110 Cal.App.3d at p. 102, the language the court used in upholding the Department's decision to issue a license in that case is equally applicable here:

The Department decided to grant petitioner's application, and "[i]n determining whether facts established by substantial evidence constitute good cause for concluding that issuance of a license will not be contrary to public welfare or morals, the 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.]" [W]e cannot say that the Department abused its constitutional or statutory discretion . . . in concluding that, on balance, the sale of alcoholic beverages at the proposed premises would not be contrary to public welfare and morals as that term is used in the agency's constitutional mandate.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.