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

AB-8582
File: 47-418412 Reg: 06061541

MARGARET SHERMAN, MICHAEL SHERMAN, and RAJAE ZAROUR,
dba Toxic Night Club/Angelo's Italian Restaurant
295 East Caroline Street, Suite A, San Bernardino, CA 92408,
Appellants/Applicants

v.

GARRETT W. ZIMMON, Chief of Police, San Bernardino Police Department,
Respondent/Protestant

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 7, 2007
Los Angeles, CA

ISSUED AUGUST 3, 2007

Margaret Sherman, Michael Sherman, and Rajae Zarour, doing business as Toxic Night Club/Angelo's Italian Restaurant (appellants/applicants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application for an on-sale general bona fide public eating place license and sustained the protest of Garrett W. Zimmon, Chief of Police, San Bernardino Police Department (respondent/protestant).

Appearances on appeal include appellants/applicants Margaret Sherman, Michael Sherman, and Rajae Zarour, appearing through their counsel, Alemayehu G. Mariam, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated June 8, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In December 2004, applicants petitioned for issuance of an on-sale general bona fide public eating place license. A protest was filed by the protestant, the Department conducted an investigation, and the application was denied. At the hearing held on April 14, 2006, oral and documentary evidence was presented concerning the application, the protest, and the Department's investigation.

The proposed premises is a large warehouse-like structure of about 44,000 square feet, divided into two parts by a solid wall. The premises previously was licensed with a type 47 license (on-sale general bona fide public eating place) and operated under the name of New West Gotham (Gotham) from 1999 until some time in 2004. In 2004, Gotham's license was suspended for 10 days and indefinitely thereafter until it complied with the terms of Business and Professions Code[2] section 23038, for failure to operate as a bona fide public eating place. (See *San Bernardino Entertainment, LLC* (2004) AB-8155.)

Applicants initially applied for a type 47 license for the entire premises, indicating they would operate as a deli or specialty restaurant, a comedy club, and a nightclub, with minimal food service and a patron capacity of 5,500. Proposed operating hours were 5:00 p.m. to 10:00 p.m., Wednesdays through Sundays. (Ex. 3 [form ABC-257].)

Department licensing representative Audrey Beckham asked for a more detailed diagram of the proposed premises, and applicants submitted a new ABC-257 form (Ex. 4), containing considerably more detail. On Exhibit 4, the restaurant portion of the premises was shown as about 2,200 square feet, or about 5% of the total floor space.

[2]Unless otherwise indicated, all subsequent statutory references are to the Business and Professions Code.

Exhibit 4 also indicated that a full service restaurant serving full meals would be provided in addition to the comedy club and nightclub; patron capacity was reduced to 3,000; food service hours were expanded to include lunch service from 12:00 p.m. to 3:00 p.m. and dinner service from 5:00 p.m. to 10:00 p.m.; operating hours were shown as 12:00 p.m. to 2:00 a.m. Wednesday through Friday, and 5:00 p.m. to 2:00 a.m. on Saturday and Sunday; seven fixed bars were indicated instead of the five shown on Exhibit 3; and alcoholic beverage sales were proposed to be 49% of total sales.

Beckham recommended to applicants that they license the two parts of the premises separately, with one section having a type 47 (restaurant) license and the other, a type 48 (on-sale general public premises) license. The latter license would prohibit entry to persons under the age of 21. Applicants, however, wanted the entire premises licensed as a restaurant, open to all ages.

Beckham also proposed a set of seven conditions designed in part to help ensure that the premises would operate a restaurant and not a nightclub. Applicants, however, refused to agree to two of the conditions: one limiting sales, service, and consumption of alcoholic beverages to the hours of 5:00 p.m. to 11:00 p.m., and the other prohibiting a cover charge.

The proposed premises is located in an area of undue concentration as determined under section 23958.4, subdivision (a)(2), and in order to be exempt from license denial under section 23598, applicants were asked to show how public convenience or necessity would be served by issuance of this license. They submitted a letter (Ex. 5) and a menu (Ex. 7). Beckham reviewed these, finding the menu was very similar to those in several other area restaurants and the principal focus of the operation was the nightclub. She concluded applicants had not shown that public

convenience or necessity would be served by issuance of this license and recommended denial of the application.

At the hearing, applicants presented "Applicants'/Petitioners' Settlement Submission to Department of Alcoholic Beverage Control." (Ex. A.) It includes a signed petition for conditional license, dated January 13, 2006; a letter regarding public convenience or necessity; a new diagram of the premises; a revised menu; and resumes of three people applicants describe as "management." The parties stipulated that Exhibit A was received by the Department on January 25, 2006. Beckham testified she had seen this exhibit, but had not considered its contents because it was received well after she had completed her investigation and made her recommendation, and she had no further assignment regarding applicants' application.

San Bernardino police sergeant Potts testified regarding his experience policing the previous licensee, Gotham, recounting numerous alcohol-related incidents, physical altercations, insufficient security, and crowds of intoxicated people beyond the capacity of the city police on duty to handle. The late-night problems became so severe, spilling over to neighboring businesses, that several other businesses ordinarily open at that time began closing early to avoid the Gotham patrons.

Co-applicant Michael Sherman testified that they propose to run a family restaurant and dinner theater. One-third of the space would be for food preparation, dining, and dancing; the other two-thirds would have a concert stage with most of the area open so that it could be reconfigured for various events. Applicants plan to spend $450,000 to $500,000 to remodel the interior.

Subsequent to the hearing, the Department issued its decision which denied applicants' petition for license and sustained the protest.

Applicants then filed this appeal contending that the administrative law judge (ALJ) abused his discretion in denying the petition for license; the decision is not supported by substantial evidence in light of the whole record; and the ALJ did not proceed in the manner required by law.

DISCUSSION

I

Applicants contend the Department abused its discretion in denying their petition for license because the denial was based on "the erroneous assumption that petitioners will behave, act and manage the proposed premises under their aegis in much the same way as their allegedly wayward predecessors." (App. Br. at p. 11.) They allege that the primary reason given by Department licensing investigator Beckham for recommending denial was that applicants' proposed use of the premises was similar to that of Gotham, the previous licensed operation conducted there. The Department's decision adopts this position, applicants argue, resulting in a conclusion based on pure speculation. Such a decision, applicants conclude, is an abuse of discretion.

In reviewing a decision for abuse of discretion, the burden is on the party complaining of the exercise of discretion to show a clear case of abuse. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566 [86 Cal. Rptr. 65, 468 P.2d 193].) Not only is the complaining party required to demonstrate affirmatively an abuse of discretion, it is required to show that the abuse was of such gravity that it amounted to "a manifest miscarriage of justice." (*Mission Imports, Inc. v. Superior Court* (1982) 31 Cal.3d 921, 932 [184 Cal.Rptr. 296, 647 P.2d 1075].) As long as the Department's decision was within reason, the Board must uphold it:

> [It] is the Department, and not the Board or the courts, which must determine whether 'good cause' exists for denying a license upon the ground that its issuance would be contrary to the public welfare or morals. [Citations.]" (*Kirby v. Alcoholic Bev. etc. Appeals Bd*. (1972) 7 Cal.3d 433, 437 [102 Cal.Rptr. 857, 498 P.2d 1105].) The reviewing body determines whether or not the Department acted arbitrarily in making its decision. If the decision is without reason under the evidence, the action of the Department constitutes an abuse of discretion and may be set aside. But 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 is within the scope of a valid exercise of the constitutionally conferred discretion (Cal. Const., art. XX, § 22), and neither the Board nor the courts may interfere therewith. (*Kirby v. Alcoholic Bev. etc. App. Bd*. (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628]; *Torres v. Dept. Alcoholic Bev. Control* (1961) 192 Cal.App.2d 541, 544-545 [13 Cal.Rptr. 531].)

(*Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd*. (1982) 133 Cal.App.3d 814, 817 [184 Cal.Rptr. 367].)

In exercising its discretion whether or not to grant a license, the Department necessarily depends to a large extent on its experience and expertise. It is perfectly reasonable for the Department to take into consideration the similarities and differences between the current applicant and a prior license holder at the proposed premises. Other factors that the Department may consider include the previous business experience of the applicant, the kind of business that will be conducted at the premises, the probable manner in which it will be operated, and the type of patrons it is likely to attract and their probable drinking habits. (*Koss v. Department of Alcoholic Beverage Control* (1963) 215 Cal.App.2d 489, 495-496 [30 Cal.Rptr. 219].)

Applicants, however, overstate the Department's reliance on the problems created by Gotham previously. Even if every reference to Gotham were stricken from the record, the existence of undue concentration and the failure of appellants to demonstrate public convenience or necessity would provide a sufficient basis for

denying the license. Applicants do not challenge the finding that they failed to demonstrate public convenience or necessity.[3] Looking at the exhibits and the testimony, there is very little of substance in applicants' attempts to show the existence of public convenience or necessity, and we cannot say that the Department's finding was unreasonable on this record.

II

Applicants contend the decision is not supported by substantial evidence in light of the whole record. They cite four legal conclusions they allege are unsupported: Issuance would tend to create a law enforcement problem and adverse conditions for other nearby late-night businesses; applicants will not operate the proposed premises as a bona fide eating place; undue concentration exists in the area in which the proposed premises is located and applicants did not show that issuance of the license would serve public convenience or necessity; and issuance of an unconditioned type 47 license would be contrary to public welfare and morals.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (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.

[3]In applicants' brief, they challenge the finding of undue concentration, but not the finding that they failed to demonstrate public convenience or necessity.

(Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *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, 826-827 [40 Cal.Rptr. 666].)

Applicants assert that "the fear and concern" about law enforcement problems and adverse conditions in the neighborhood were the "principal reason[s]" for denying their application. The ALJ's conclusion of a "substantial likelihood" that problems similar to those experienced before would recur, applicants argue, is based on conjecture and speculation[4] that they will cause the same problems that Gotham did.

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[4]At oral argument before the Appeals Board, appellants criticized the "speculative testimony" of the Department investigator about the potential for problems similar to those generated by Gotham. The Department's conclusion based on this "speculation," appellants urged, resulted in a "prior restraint" imposed on appellants' business operations, which violated due process. Similar objections made to testimony in *Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433 [498 P.2d 1105, 102 Cal.Rptr. 857] were rejected by the California Supreme Court based on the nature of the inquiry involved in an application case and the Department's goal in evaluating an application:

> [T]he Department's role in evaluating an application for a license to sell alcoholic beverages is to assure that the public welfare and morals are preserved "from probable impairment in the future." [Citation.] Of necessity, in appraising the likelihood of future harm to the public welfare,

(continued...)

As noted earlier, the experience of the Department and law enforcement with the prior licensee is a relevant consideration in determining whether to grant a license. The basic similarities between the proposed operation and the prior operation– an extremely large premises, no restriction on the age of patrons, service of alcoholic beverages allowed until closing, after 1:00 a.m., and restaurant activities clearly secondary to the primary business of running a nightclub or entertainment venue – provide reasonable support for the inference that similar problems are highly likely to arise. There is clearly substantial evidence to support the findings that are the basis for Legal Conclusion 8:

> 8. Issuance of the applied-for unconditioned Type 47 license would tend to create a law enforcement problem for local authorities and adverse conditions for other nearby late-night businesses. A preponderance of the credible evidence established the substantial likelihood that the same or similar law enforcement problems would recur as had been experienced under the immediately predecessor operator. (Findings of Fact, ¶¶ 2, 8, 12-15, and 24-27.) It was established that Petitioners were unwilling to agree to certain conditions recommended by the Department. (Findings of Fact, ¶¶ 14 and 21.) It was established that Petitioners remained at all times desirous of licensing the entire 44,000 square-foot Proposed Premises as a restaurant, thereby permitting entrance at all times to persons under the age of 21 years, without limiting hours of operation or manner of operating. (Findings of Fact, ¶ 8; *see also* Findings of Fact, ¶ 6.) In the circumstances, the past is prolog.

The same substantial evidence that supports Legal Conclusion 8, above, also supports Legal Conclusion 9 – "A preponderance of the credible evidence established that Petitioners will not operate the Proposed Premises as a bona fide public eating-

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[4](...continued)
the Department must be guided to a large extent by past experience and the opinions of experts. As stated in *Kirby v. Alcoholic Bev. etc. App. Bd*. [(1968)] 261 Cal.App.2d 119, 129 [[67 Cal.Rptr. 628]], "Complaint is made that some of the evidence is opinion testimony purely speculative and conjectural, [. . .] *but it should be borne in mind that the proposed business is not yet in operation and the attempt to assess its future impact on public welfare and morals must be and is based on experience, sound reason and evidence in the record*. [Citation.]" (Italics added.)

(7 Cal.3d at p. 441.)

place." Under the circumstances, not only are the conclusions in the decision reasonable, it is difficult to see how the Department could have reached any different conclusions.

Applicants seem to miss the point when they object to the conclusion that the proposed premises is located in an area of undue concentration. They assert "[t]here is little substantial evidence supporting the existence of facts which could be deemed to constitute 'undue concentration' in petitioners[']application herein." (App. Br. at p. 28.)

The facts that demonstrate the existence of undue concentration are set by statute. Business and Professions Code section 23958.4, subdivision (a)(2), requires a finding of undue concentration when the ratio of on-sale retail licenses to population in the census tract in which the proposed premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the proposed premises are located. Since applicants have not challenged the determination of the pertinent ratios demonstrating the existence of undue concentration, their contention must fail.

Applicants contend the conclusion that issuance of the license would be contrary to public welfare and morals is not supported by substantial evidence. However, since, as discussed above, substantial evidence supports the Department's conclusions regarding law enforcement problems, operation as a bona fide eating place, undue concentration, and public convenience or necessity, substantial evidence also supports the Department's ultimate finding that issuance would be contrary to public welfare and morals.

Applicants base their final contention, that the ALJ did not proceed as required by law, on their other arguments. We have rejected those arguments and, of necessity, their final contention also fails.

ORDER

The decision of the Department is affirmed.[5]

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

[5]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.