

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

AB-8683

File: 48-418122 Reg: 05060844

COWBOY UP, INC., dba AKA KJ's
256 Petaluma Boulevard North, Petaluma, CA 94952,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 3, 2008 San
Francisco, CA Re-deliberation May 1, 2008

ISSUED: JULY 8, 2008

Cowboy Up, Inc., doing business as AKA KJ's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which, although overruling protests by nearby residents, approved its exchange of an on-sale bona fide public eating place license, for an on-sale general public premises license, subject to appellant's agreement to petition for a conditional license containing, among others, a condition directed at the control of the noise level of entertainment within the premises.

Appearances on appeal include appellant Cowboy Up, Inc., appearing through its president, Wayne Vieler and its counsel, Marc Libarle, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant petitioned for a conditional type 48 (on-sale general public premises)

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The decision of the Department, dated February 1, 2007, is set forth in the appendix.

license to be issued in exchange for an existing type 47 (restaurant license). The petition for conditional license executed by its owner, Wayne Vieler, contained the

following recitals:

WHEREAS, petitioner(s) has/have filed an application for the issuance of the above-referred-to license(s) for the above-mentioned premises; and,

WHEREAS, the application was protested by David and Collin Boyd, et al; and,

WHEREAS, the proposed premises is located within the immediate vicinity of a residential area; and,

WHEREAS, the proposed premises is adjacent to an unlicensed facility, located within the same structure, that is also controlled by the petitioner(s); and,

WHEREAS, the issuance of an unrestricted license would be contrary to public welfare and morals;

The petition set forth three conditions:

No. 1: Entertainment provided shall not be audible beyond the area under the control of the licensee(s) as defined on the ABC-257 dated 12-30-04.

No. 2: Petitioner(s) shall provide a minimum of one (1) security personnel on Thursday, Friday and Saturday nights within the entrance of the premises between the hours of 10:00 p.m. and a half hour after closing to maintain order within and outside the premises and to prevent any activity which would interfere with the quiet enjoyment of their property by nearby residents. Said security personnel shall be clothed in a manner readily identifiable as security.

No. 3: When the adjacent unlicensed portion of the facility, indicated as Area 2 on ABC-257 dated 12-30-04, is being used by persons under the age of twenty-one (21), the petitioner(s) shall provide an additional four (4) security personnel, one (1) each in positions A and C between the hours of 9:00 p.m. and closing and one (1) each in positions B and D between the hours of 11:00 p.m. and 1:00 a.m. Said security personnel shall be clothed in a manner readily identifiable as security.

Several nearby residents protested, complaining that the noise generated by the premises interfered with their sleep and the quiet enjoyment of their residences. The protests were overruled subject to applicant's petitioning for a conditional license containing the three conditions on the original petition for conditional license (with

condition 1 modified as the italics which follow indicate) and additional conditions contained in Legal Conclusions 7 and 8, as follows:

LC 7:

1. Entertainment provided *within Applicant's business* shall not be audible beyond the area under the control of the licensee as defined on *the ABC-257* dated 12-30-04.

[2. See above.]

[3. See above.]

4. At all times after 10:00 p.m. and when entertainment (including a DJ) is playing, all doors to Applicant's business shall be kept closed, except in emergencies or to permit patron ingress/egress.

5. Appropriately worded signs are to be posted facing both inside and outside Applicant's business reminding patrons of the need to refrain outdoors from loud talking, yelling or other behavior likely to disturb others out of deference to the reasonable and legitimate concerns of residents of the surrounding neighborhood. Similarly placed signs are to be posted identifying off-street parking locations available to patrons of the licensee and requesting patrons not to park in the nearby residential neighborhood.

6. Loitering of any sort, including for patron smoking, is prohibited on the Petaluma Boulevard North side of the building each day of the week after 11:00 p.m.

LC 8:

Approval of the license exchange, subject to the 2L [Exhibit 2L is the petition for conditional license] conditions, as amended by paragraph 7, will not be inimical to public welfare or morals.

The notice of appeal asserts:

Condition #1, as written, violates Applicant's rights to the reasonable expectation of being able to conduct his business responsibly, lawfully, at a volume level and in a manner consistent with the Commercial District within which the business is located.

DISCUSSION

Appellant has operated as a nightclub, and plans to continue to do so. So that it

may continue to conduct dance evenings attended by 18- to 20-year-old patrons, the licensed portion of the premises will be reduced and operated as a bar, open only to patrons over the age of 21, and separated from the much larger remaining portion of the premises, which will not be licensed. The licensed area will be separated from the unlicensed area by a series of plexiglass partitions and security guards stationed such that minors admitted to the unlicensed area cannot gain entry into the bar area.

Appellant's position is that compliance with the decibel limit in the city's noise control ordinance ought to be sufficient, and that it opposed, but subsequently agreed to the inclusion of the condition in the petition for conditional license after Department representatives assured it that it could ask the administrative law judge (ALJ) to remove it. It argues that the condition is subjective, exposing it to arbitrary enforcement, while compliance with the decibel levels in the city's noise ordinance is more desirable, because it is based on an objective standard.

Appellant's self-described "succinct" single-spaced 28-page brief is filled with appellant's claims of improprieties in the administrative proceeding and in the proposed decision which the Department adopted. Most of the matters complained of do not relate in any way to the single issue set forth in appellant's notice of appeal.

We are forced to conclude that no useful purpose would be served by our attempting to address the many and diffuse complaints set out in appellant's brief or referred to in oral argument, virtually none of which relate in any way to the condition appellant "strongly protests" (App.Br., page 16). It would seem that appellant's success at the administrative hearing has rendered them moot.

Business and Professions Code section 23800 provides that the Department may place reasonable conditions upon a retail license in several situations, one of which is where a protest against the issuance of a license has been filed and the Department finds that the grounds for the protest will be removed by the imposition of those conditions.

In this case, appellant was advised by the Department that the sought-for license would not be issued unless certain conditions were included. Rather than refusing to

accept the conditions, and risk denial of the license, appellant agreed to petition for a conditional license containing three conditions proposed by the Department's licensing representatives. After the hearing, Judge McCarthy concluded that additional conditions were required, and that the condition in question needed to be limited to noise generated by entertainment within the premises. Given that appellant's petition for conditional license included the same condition in a somewhat broader form, it is difficult to see why appellant has any reason to complain.

The Department has been entrusted with broad discretion whether to grant or deny an application for a license. (See *Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433 [102 Cal.Rptr. 857].) In the absence of an abuse of that discretion, this Board is powerless to act.

Ironically, both appellant and protestants have, in their arguments to the Board, missed the significance of the administrative law judge's (ALJ's) modification of condition No. 1. Appellant characterized the condition as imposing a "zero tolerance" noise level, while protestants viewed it as applying to noise of whatever source. Neither is correct.

Our review of the decision leads us to believe that the modification of the language of condition No.1 can be traced in large part to a specific finding and a specific legal conclusion in the proposed decision, and seen as the most reasonable means of addressing the basic problem - noise reasonably within appellant's control.

Finding of Fact 22 describes the noise disturbances to which the protestants

have been exposed, and makes it clear that appellant's operation is not the sole

source

of their concern:

FF 22: Each of the Protestants resides within a few short blocks of both the Proposed Premises and many other Department-licensed businesses in the downtown core of the City of Petaluma. (See Exhibits 2B & A.) They are frequently disturbed by the late night and early morning activities outside their homes of patrons of one or more of the Department-licensed businesses. It is often difficult for the disturbed person to know exactly where the person or persons responsible for the disturbance had last been consuming alcoholic beverages. Some of the disturbances come from activities in the park. Others occur on the streets outside the Protestants' homes. Some of the disturbances are directly related to activities occurring at Applicant's business. These latter disturbances include unwanted noise and bass vibration from entertainment being provided there.

Similarly, Legal Conclusion 6 notes that appellant's business interferes with the quiet enjoyment of nearby residents, as well as appellant's efforts to control noise, and implies that entertainment provided within the premises is the principal culprit:

CL 6: Despite the security plan, the soundproofing that Applicant has installed and the reconfiguration of the front doors, Applicant's current business does interfere with quiet enjoyment of nearby residences. The two visits at or near closing time by Investigator McCabe, if nothing more, clearly establish that the front doors to the Proposed Premises have not routinely been kept closed when entertainment has been provided. The security guards have not always been where they were supposed to be and they have not always been accomplishing their intended purposes on the nearby streets. It was also established that exchanging the two licenses are [sic] not reasonably expected to make matters any worse than they are at present. In addition, imposition of and compliance with the Exhibit 2L conditions has a good chance of improving matters, that is, reducing the frequency and duration of late-night and early morning neighborhood disturbances.

We note also the sentence in Legal Conclusion 7 that states, "an ambiguity has been noted in Exhibit 2L, condition 1, as presented." Although the ALJ did not expressly identify the ambiguity, it would appear from his revision to that condition that

he thought it would extend to activities and areas for which appellant could not fairly be held responsible. On the other hand, the nature and type of entertainment offered by appellant are entirely within its control, and a legitimate target for restraint. This Board has seen other cases where entertainment volume and bass levels, which can generate

vibrations and noise capable of reaching well beyond the physical location of the business, require such conditions. (See *San Diego Marvin Gardens* (1999) AB-7215;

Fahime Martin (1999) AB-6650.)

Newly-added conditions 4, 5, and 6 continue in the same vein. Appellant is expected to exert at least some moral suasion toward its patrons to respect those living in the vicinity through the use of signs and the efforts of its security personnel, and these conditions do not appear unreasonable, given the nature of appellant's business.

All in all, we think the ALJ reached a conclusion that reasonably weighs all the competing interests and yields a fair and equitable result.

ORDER

The decision of the Department is affirmed.²

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

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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.