

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

AB-8771

File: 41-434570 Reg: 07065735

DANIELLE ELLIOTT, Appellant/Protestant

v.

DANIEL BENJAMIN FLORES and GUSTAVO JAVIER LANDGREBE,
dba Tasca
8108 Third Street, Los Angeles, CA 90048,
Respondents/Applicants

and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 4, 2008
Los Angeles, CA

ISSUED DECEMBER 22, 2008

Danielle Elliott (appellant/protestant) appeals from a decision of the Department of Alcoholic Beverage Control¹ granting the application of Daniel Benjamin Flores and Gustavo Javier Landgrebe, doing business as Tasca (respondents/applicants), for an on-sale beer and wine public eating place license.

Appearances on appeal include appellant/protestant Danielle Elliott, appearing in propria persona; respondents/applicants Daniel Benjamin Flores and Gustavo Javier Landgrebe, appearing through Daniel Flores; and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated October 26, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In late 2005, applicants applied for issuance of an on-sale beer and wine public eating place license. The Department conducted an investigation resulting in a recommendation for approval of the license with conditions. Appellant filed a protest and requested a hearing. At the administrative hearing held on September 11, 2007, oral and documentary evidence was presented concerning the application and the protest.

Department licensing representative Margot Hoffman testified about her investigation of this license application. The premises is located in an older neighborhood of Los Angeles on a commercial street with parking and an alley behind it, and beyond the alley, single family homes and apartment buildings. The menu consists of moderately priced French, Italian, and Spanish dishes.

Eleven residences are within 100 feet of the premises. The residents were contacted, but none responded. Protestant lives about 700 feet northwest of the premises.

Hoffman contacted the Los Angeles Police Department (LAPD) and receive a letter in response from Captain Wemmer. The letter stated that although the census tract had an overconcentration of alcoholic beverage licenses (based on population, 3 are allowed, but 15 exist), the numbers of both crimes and DUI-related traffic collisions and arrests were below average for the reporting district. The LAPD did not object to the license, but recommended a number of conditions be placed on the license. Sergeant Karmody of the Wilshire Division of the LAPD reported there had been no calls for service at the premises between December 2005 and April 2007, that crime in the reporting district had decreased by 16 percent from 2005 to 2006, and his own experience on duty was that there was not a police problem in this area.

Because the license overconcentration in the area is a basis for denying the license application (Bus. & Prof. Code, § 23958), applicants were required to demonstrate that public convenience or necessity would be served by issuance of the license (Bus. & Prof. Code, § 23958.4, subd. (b)(1)). The Department concluded that the requirement of public convenience or necessity was met by applicants' unusual combination of cuisines, the number of visitors attracted to the area, and the foot traffic from local residents and businesspeople.

The Department reviewed the conditions suggested by the LAPD and the concerns of the protestant and added six conditions to the license to address the issues of license overconcentration and nearby residents. Applicants signed a Petition for Conditional License on January 12, 2007, agreeing to the conditions. The conditions require that: sales of alcoholic beverages shall not exceed sales of food, entertainment shall not be audible beyond the area under the licensees' control, alcoholic beverages shall not be sold for consumption off the premises, the license shall not be exchanged for a public premises license, graffiti must be removed within 24 hours, and the area around the premises over which licensees have control shall be maintained free of litter.

Applicants were issued an interim license in January 2007. Hoffman had received no complaints about the premises following issuance of the interim license.

Co-applicant Daniel Flores testified that he and his partner wanted to provide a small intimate restaurant with moderately priced food that families would be comfortable visiting. The premises is called Tasca, which Flores said refers to "your neighborhood place." They want to serve excellent food and wine to compliment the food. He said that although Tasca is called a wine bar, a wine bar does not just serve wine and it is not a "bar."

Since acquiring the interim license, applicants serve wine by the taste (\$5), by the glass (\$6-\$18), and by the bottle (\$20-\$55). They also serve a few imported beers. A variety of "small plates" or appetizers are available (\$5-\$16) as well as entrees (\$14-\$20). Entertainment consists of recorded music.

The premises seats 33 people inside.² Applicants have arranged for a total of 16 parking spaces behind the building, and Flores testified that this has been sufficient parking for their busiest nights. They offer valet parking, with two spaces at the front of the building for passenger unloading. Local residents will often walk to the premises.

The hours of operation are 5:30 p.m. to 11:00 p.m., Sunday through Thursday, and until midnight on Friday and Saturday. They also serve brunch on Sundays.

Protestant testified that applicants were denied a Conditional Use Permit (C.U.P.) by the City of Los Angeles at first; it was later approved with conditions. She said that applicants were in violation of a number of the conditions.

She described parking as a major problem in the area. Protestant referred to an article in the L.A. Times alleging that many parking leases submitted to the zoning commission are fictitious. She stated that many of the restaurants did not have adequate parking, even though they said they had leases supplying parking. She said that Tasca's parking had not been verified, but she knew that a number of new businesses shared the parking area for that building.

There is metered parking on Third Street, but in the residential area behind the premises parking is by permit only. Protestant testified that many of the restaurants in the area have valet services, but the parking valets park the cars in permit spaces and

²Service is available at a few tables outside as well, but alcoholic beverages are not served there.

block driveways in the residential area. The valets also speed through stop signs. Both restaurant customers and valets drive unsafely. In an area encompassing four census tracts, protestant said, 77 accidents had occurred, four of which involved alcohol. Third Street, she said, was the most dangerous street for automobile accidents.

According to protestant, a previous restaurant (with different owners) operating where Tasca is now caused considerable problems and "the community" did not want another restaurant in that location. In the five city blocks that make up the community, protestant said, there are over 30 restaurants, most of which have liquor licenses. The restaurants in the area have disrupted the health and safety of the nearby residents. Protestant said there was a problem with public drunkenness and that when patrons left the numerous licensed restaurants, they made a great deal of noise, vomited, and had sex in the front yards of nearby houses.

Protestant disputed the public convenience or necessity of issuing the license, saying that there were two other restaurants serving Mediterranean food and a number of other wine bars. In the protestant's opinion, applicants' wine bar was a bar, not a restaurant, and it was not unique. Applicants' premises was located in what had been a close community that was being inundated with irresponsible commercialization and a glut of alcoholic beverage licenses. Protestant said she had not dined at or been to the premises.

Subsequent to the hearing, the Department issued its decision which allowed the license to issue. The protestant thereafter filed an appeal making the following contentions: (1) The Department's decision misstates the grounds for objection to issuance of the license; (2) the findings are not supported by substantial evidence in light of the whole record; and (3) evidence was improperly excluded at the hearing.

DISCUSSION

I

Appellant contends the ALJ erred by addressing two issues she did not raise, litter and graffiti, and excluding issues she raised about parking valets and traffic congestion caused by "the excessive number of licensed premises." (App. Br. at p. 2.)

Consideration of two issues not raised by protestant is no more than surplusage, and if error, it is harmless. The failure of the ALJ to address protestant's allegations of speeding parking valets and traffic congestion was due, the Department contends, to protestant's failure to show any connection between the problems she described and applicants' premises. Protestant's testimony was almost entirely about restaurants, parking, and parking valets in the area in general, not about applicants' premises in particular. The allegations that referred to the applicants specifically had to do with their C.U.P., not their alcoholic beverage license, or were unsubstantiated.

Protestant's complaint about the ALJ excluding issues she thought important is unjustified. As the court explained in *J. C. Wattenbarger & Sons v. Sanders* (1963) 216 Cal.App.2d 495, 503-504 [30 Cal.Rptr. 910]:

[I]t is a respected general rule that when there is no evidence in the record which would have supported a finding favorable to an appellant, the failure to make a finding on the subject does not constitute error. As is said in 2 Witkin, California Procedure, Trial, section 119, page 1851:

The appellant may justly complain if he introduces evidence sufficient to support a finding in his favor on a material issue, and the court fails to make any finding thereon. But if he produces no evidence on the issue, or the evidence is such that the finding would necessarily be adverse to him, he suffers no prejudice from the failure to make it, and there is no reversible error. [Citing cases.]

Reading the transcript of the administrative hearing, it becomes obvious that protestant's evidence was so unpersuasive and unsubstantiated it was not necessary to discuss appellant's allegations regarding parking valets and traffic congestion, since they could only have been rejected.

II

Appellant contends that Finding of Fact 5 and Legal Conclusion 7 are not supported by substantial evidence in light of the whole record.

Finding of Fact 5:

The Los Angeles Police Department was informed of this application and given an opportunity to provide input as to whether or not it should be approved. The Department received a response from Captain Wemmer which stated that the Los Angeles Police Department was not opposed to the issuance of the license.

Legal Conclusion 7:

Denial of the license is required unless it can be established that public convenience or necessity would be served by the issuance of the license. (Section 23958.4(b)(1)). The Applicant did establish that public convenience would be served by issuance of the license. The menu is unique when compared to other nearby establishments. There is a considerable amount of residents within walking distance. There are also numerous visitors to the area. Patrons of the restaurant have requested to be able to purchase wine or beer to compliment their meals. (See Exhibit 6). (Findings of Fact, ¶ 9).

"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. (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]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

Protestant asserts there is no substantial evidence supporting the finding that the LAPD did not oppose issuance of the license because the letter from the LAPD contained conditions it wanted imposed on the license. However, the Department representative testified that the LAPD did not oppose issuance of the license and provided a list of suggested conditions. The letter from Captain Wemmer of the LAPD was a form letter that requested numerous conditions that had no application to applicants' premises. The Department added the conditions it thought best addressed the concerns expressed by the LAPD and the protestant.

This testimony is substantial evidence supporting the finding, and protestant did not provide any relevant evidence contradicting the finding. Therefore, this contention is unjustified on the record as a whole.

Protestant's contention that public convenience or necessity was not shown because the menu from applicants' restaurant was similar to the menus of other restaurants in the area, is really asking this Board to substitute its judgment of the evidence for that of the ALJ and the Department. The Board is not entitled to do so.

The Department's decision concluded that public convenience or necessity was shown because applicants' menu was unique in the area and because of the number of potential patrons from both local residents and businesses and visitors to the area. In many cases, issuing a license will be beneficial to some and seen as detrimental by others; in such cases, the Department must balance the conflicting interests, and the Appeals Board will uphold the Department's exercise of its discretion unless it is shown to be arbitrary and capricious. (*Lissner v. Hennessey's Tavern, Inc.* (1998) AB-6911.) Protestant has made no such showing here.

III

Appellant contends that evidence regarding the validity of applicants' C.U.P. and the proceedings before the City of Los Angeles was improperly excluded at the administrative hearing.

When protestant began to testify about the C.U.P. proceedings by the city, the ALJ explained to her the difference between the Department and the city with regard to jurisdiction and enforcement:

If there have been violations of the conditional-use permit, they are not the responsibility of the Department of Alcoholic Beverage Control to enforce. They were placed on there by the City of Los Angeles, and it's up to the City of Los Angeles to ensure compliance with the conditions of the C.U.P.

Now, normally what I have seen as far as conditions placed on a C.U.P., some of them do mirror and relate to what the Department of

Alcoholic Beverage Control is concerned with. Many of them go above and beyond what A.B.C. can and cannot regulate. I don't know what those conditions are. [RT 62-63.]

The ALJ was accurate in his explanation, and he properly excluded the testimony.

The Department's concern having to do with local zoning is simply to determine whether applicants comply with local zoning and conditional use requirements. (Bus. & Prof. Code, § 23790.) The Department representative confirmed with the City of Los Angeles that applicants were required to, and did, obtain a conditional use permit and that they complied with all zoning ordinances. (Ex. 2; RT 30.) The Department has no jurisdiction to oversee or second-guess the city's zoning determinations. Protestant's concerns about these issues must be addressed to the City of Los Angeles. While the city and the Department may have some issues in common regarding applications, each deals with its own set of rules and responsibilities.

The ALJ properly directed protestant to go to the city with her concerns regarding applicants' C.U.P., and properly excluded evidence about the C.U.P. at the hearing regarding applicants' alcoholic beverage license.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.