ISSUED NOVEMBER 12, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD-

OF THE STATE OF CALIFORNIA

LINDA SUE CERVIN & JORGE SIQUEIROS dba Characters Bar & Grill 15918 Walnut Street Hesperia, CA 92345, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6783 File: 48-298181 Reg: 96036749 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing:- August 6, 1997 Los Angeles, CA

Linda Sue Cervin and Jorge Siqueiros, doing business as Characters Bar & Grill (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their application to modify a condition on their on-sale general public premises license which prohibited live entertainment and amplified music, finding that modification of the condition would be contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, as provided in Business and Professions Code §§23800 and 23801.

[1]The decision of the Department dated November 21, 1996, is set forth in the appendix.

Appearances on appeal include appellants Linda Sue Cervin and Jorge Siqueiros, appearing through their counsel, Diane Carloni Nourses; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on January 18, 1995. Thereafter, on March 5, 1996, appellants filed an application for modification of one of the conditions on their license which condition prohibited live entertainment and amplified music within the premises. The Department of Alcoholic Beverage Control denied the request on June 28, 1996.

An administrative hearing was held on October 11, 1996, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department of Alcoholic Beverage Control issued its decision which denied the request to modify the condition. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the denial of the application for modification of the condition which prohibited live entertainment or amplified music, was not supported by the findings, in that the measurements of the distance required by the rule were improper, (2) appellants were surprised by the introduction of irrelevant testimony of a police officer, and (3) the issue of public welfare and morals was not a proper issue before the Department.[2-]

[2]While contentions 2 and 3 appear to be arguments of contention 1, we will discuss contention 1 separately and address contentions 2 and 3 together.

DISCUSSION

I

Appellants contend that the denial of the application for modification of the condition which prohibited live entertainment or amplified music, was not supported by the findings, arguing that the measurements of the distance required by the rule were improper.

Near the time of the issuance of appellants' license, they signed and therefore consented to eight conditions which were imposed on their license. The reasons for the imposition are set forth in the preamble to the conditions: there is a residence within 100 feet of the premises or its parking lot and issuance without the conditions would interfere with the quiet enjoyment of their property by the nearby residents as provided in California Code of Regulations, title IV, §61.4 -- commonly referred to as rule 61.4 (at the time of the imposition of the conditions, the Code was the California Administrative Code).

Essentially, the rule provides that no license "shall" be issued if any of the enumerated designations apply. If any exist, the burden then shifts to the applicant to prove that issuance will not interfere with the residential quiet enjoyment of the targeted group.[3-]

The rule in pertinent part provides:

> "No original issuance of a retail license or premises-to-premises transfer of a retail license shall be approved for premises at which either of the following

[3]However, the rule also states that "... the department may issue ... where the applicant establishes that the operation of the business would not interfere with the quiet enjoyment ... by residents."

> conditions exist: (¶) (a) The premises are located within 100 feet of a residence. (¶) (b) The parking lot or parking area which is maintained for the benefit of patrons of the premises, or operated in conjunction with the premises, is located within 100 feet of a residence. Where the parking lot is maintained for the benefit of patrons of multiple businesses in the vicinity of the premises, the parking area considered for the purpose of this rule shall be determined by the area necessary to comply with the off-street parking requirements as mandated by the local ordinance, or if there are no local requirements for off-street parking, then the area which would reasonably be necessary to accommodate the anticipated parking needs of the premises, taking into consideration the type business and operation contemplated.[4-]
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> "Distances provided for in this rule shall be measured by airline from the closest edge of any residential structure to the closest edge of the premises or the closest edge of the parking lot or parking area, as defined hereinabove, whichever distance is shorter."

So important to the civility of the community is the enjoyment of one's own home without interference from outside conditions which can be reasonably controlled, the United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471, 100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263.) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50, 96 S.Ct. 2440,

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[4-]The rule defining what constitutes a parking lot, is vague and somewhat ambiguous. In cases like the present appeal, the rule leaves it to the litigants to come up with a definition that is a reasonable extension of logic based on evidence, which in this case is far from illuminating. However, since a following paragraph apparently references paragraph (b) above, we infer that the rule is salvageable due to the last phrase of paragraph (b), beginning with the words "... then the area which would reasonably be necessary to accommodate ..." as a description of what constitutes the parking lot. While the descriptive testimony of Sena leaves much to be desired from a professional investigator's point of view, it is adequate for our purposes of determining who has the burden of proof.

49 L.Ed.2d 310, and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v.-Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433,-441 [102 Cal.Rptr. 857], the Supreme Court said:

> "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the opinions of experts."

Although the case was not a rule 61.4 case (the closest residence was about 150 feet away), the Kirby court upheld the Department's determination that issuance of the license sought therein would, inter alia, interfere with nearby residential quiet enjoyment even though no nearby resident had voiced opposition to the license. The court took note of substantial evidence on both sides of the issue and concluded that the expert witness testimony of the county sheriff was sufficient to support the Department's crucial findings.

With these foundational principles, we pass to the present appeal's major and determinative issue, that of removal of a condition, which removal is regulated by Business and Professions Code §23803. The statute in pertinent part states:

> "The department ... if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal."[5-]

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[5]Finding XX, second paragraph, is erroneous. The issue concerning whether rule 61.4 applies, is not, in the present appeal, one of collaterally attacking a non-appealable decision of the Department, but an attack on the present Department's analysis and investigation to determine, if indeed the Department was correctly "satisfied" that the rule still applied. Circumstances can change, the area of the

Pursuant to this statute, the Department presented testimony of Michael Sena, a Department investigator. Sena testified that the distance from the parking lot to the nearest resident structure was 93 feet from the start of the parking lot driveway (a direct line from a view of Exhibits 5 and B). Sena also testified that it was 97 feet, three inches, from the beginning of the white stripes of the parking area, a line more angular than straight [RT 18 & Exhibits 5 and B].

Appellants presented the testimony of Joseph Elmer Miller, a licensed land surveyor, who testified that the Department's use of a Roletape machine was less accurate than Miller's horizontal distance measure by electronic devices [RT 60, 63]. Miller testified that the area measured was not level and that could further lead to a tape measurement that was inaccurate [RT 59-63]. Miller further testified that the distance was 101 feet, one inch, from the residential structure to the closest parking stall line, a distance apparently more angular than straight [RT 60, and Exhibit B].[6-] Exhibit B shows Miller's calculations of 101 feet, one inch, to the

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parking lot boundaries and the situs of the residential dwelling, to name two. The prior imposition of the condition is not "cast in concrete," but may under proper circumstances, be questioned as to its present status.

When the Department presented credible evident (subject to attack during the hearing), the burden then shifted to appellants to prove the "satisfaction" of the Department was in error. This burden appellant shouldered by introducing expert testimony and distance verification.

[6]Finding X, first paragraph, is erroneous. While the Department may use any measuring means it so chooses, if there is valid testimony of a more accurate measuring system under acceptable criteria, that system must be preferably accepted over a less accurate system. A less accurate system may be practically easier and in most cases sufficiently accurate that reasonable minds would accept its measurements.

nearest start of the parking lot stripe (the Department investigator calculated 97 feet, 3 inches -- exhibit 5).

We view Miller's measurements as more accurate. The standard use of the Roletape, a practical and easy measuring device, does not conform to the demands of the rule which calls for “airline” measurements, in situations like the present appeal where there are variants in the land topography [RT 59-63].

However, the apparent problem in Miller’s measurements is not the variance between Sena’s and Miller’s angular measurement to the edge of the first white stall line, but as to the nearest edge of the closest point of the parking lot. Exhibit 5 [and RT 18]-- Sena’s calculations, show a distance of 93 feet from the closest edge of the residential structure to the closest edge of the parking lot, as demanded by the rule. There is no other evidence which contradicted those measurements. Miller, apparently, did not measure the rule’s demanded measurement, but according to Exhibit B, measured not to the parking lot, but to the property line -- not a factor within the rule.[7-]

However, in the present appeal, the contest issue of distances is so close that inches may determine who will prevail due to the applicability of the rule and the burden it imposes. Therefore, deference cannot be given to the Department measuring system just because it uses a "long accepted" method which in this case, due to the minute distances in question, is wholly without reason.

[7]By mathematically comparing the differences between the angular measurements of Sena and Miller, to Sena’s direct measurement to the closest edge of the parking lot, the difference or comparison would result in a distance more than Sena’s 93 feet, but less than the rule’s critical 100 feet.

We determine that the rule was properly found to apply, and that the burden, therefore, shifted to appellants to show that modification of the conditions would not interfere with residential quiet enjoyment.

II

Appellants contend they were surprised by the introduction of irrelevant testimony of a police officer, and that the issue of public welfare and morals was not a proper issue before the Department.

Sergeant Patrick Daley's testimony concerned probable traffic problems [RT 41]-and potential law enforcement problems [RT 41-46, 51].-

Appellants argue that the testimony of the sergeant should have been excluded as it was not part of the statement of issues, and therefore they were "surprised."

The record shows that the Department denied the requested modification on June 28, 1996, alleging public welfare and morals concerns and stated the grounds which caused the imposition of the conditions "... continue to exist."

The notice of the administrative hearing had attached as a Statement of Issues, appellants' request for modification. Also attached was a statement of the "discovery" regulations of which appellants could avail themselves. Apparently, according to the absence of a request in the record, appellants did not request discovery which would have shown the sergeant's investigative views to the Department investigator [RT 31]. Appellants' argument of "surprise" has no support from the record.

The issue, therefore, is whether the testimony of the sergeant is relevant to the proceedings. We conclude that it is, in a limited manner. The testimony goes more to negating any attempt of appellants under their burden to show the removal of the conditions would not create an adverse impact on nearby residential quiet enjoyment. As we determine from the record, there was little attempt by appellants at the hearing to meet their burden. The testimony of the officer then was basically of little significance, as it essentially was, in effect, a rebuttal to the issue that appellants could have shown non-interference.

The sergeant testified as to his views from his years of experience, that premises where live entertainment and alcoholic beverages are enjoyed together, would most likely result in greater attendance and corresponding traffic problems in this case, considering the limited parking area around appellants' premises. Also, such increase of clientele to the premises would most likely create police problems due to assaults and fights which commonly attend bars with live entertainment, as experienced by other like businesses in the immediate and general area [RT 42-46, 48, 50-51].

Notwithstanding appellants' objections to the sergeant's testimony and that Sena's reasons for recommending denial were only for noise, it is the Department and not the investigator who makes the ultimate decision as to a course of action and the reasons for such final Department decision. Rule 61.4 is designed to maintain the public quiet around such 61.4 residences. Noise from internal commotion such as live entertainment is only one of the nuisances to which

residents may be subject. Interference with quiet enjoyment of property can come from premises' clientele exiting being external from any in-premises commotion, and attendant noise factors.

The Appeals Board observed in the case of Bakery v. Argentine Association of Los Angeles, Inc. (1992) AB-6238, that while applicant [therein] had made many on-site improvements, "the problems of parking and congestion apparently was regarded by applicant [therein] as a problem to be addressed by the city ... Forgotten by applicant is the department's responsibility to see that the licensed premises' operation does not adversely affect nearby residents."[8-]

The case of Domich v. Sacramento Natural Food Co-Op. Inc. (1992) AB-6248, was a case in which rule 61.4 and the issue of parking collided. The Appeals Board stated that "Parking -- with resultant impact on nearby residents -- is a factor the department may consider in its evaluation, which apparently the department has done." The Board went on to state: "We view the record in the instant case as replete with evidence of a dire problem to those who already bear the brunt of applicant's employees' and patrons' vehicles being parked in the nearby residential areas and a probable expansion of that problem due to the expected increase in business that would result from issuance of the applied-for license."

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[8]Parking is a problem that the Department may consider in its decision making process. (See Martin v. Alcoholic Beverage Control Appeals Board & Richards (1959) 52 Cal.2d 238 [340 Cal.Rptr. 1, 7]. Also see Vasquez (1988) AB-5678.)

We conclude that "surprise" is not a defense as we have already outlined. The issue of whether the modification should be granted considering all the factors which the Department had presented to it, is within the province of the Department's discretion, and from a review of the record as a whole, we conclude that that discretion was not abused.

Appellants further argue that public welfare and morals was not a proper issue. Public welfare and morals is not usually an issue, but is the ultimate fact. (Bailey v. Department of Alcoholic Beverage Control (1962) 201 Cal.App.2d 348 [20 Cal.Rptr. 264, 267], and Martin v. Alcoholic Beverage Control Appeals Board (1959) 52 Cal.2d 259, 265 [341 P.2d 291, 294].) The court in Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 99 [84 Cal.Rptr. 113], defined the concept of public welfare and morals in a manner that adapts the definition to almost all factual matters and circumstances:

> "It seems apparent that the 'public welfare' is not a single, platonic archetypal idea, as it were, but a construct of political philosophy embracing a wide range of goals including the enhancement of majority interest in safety, health, education, the economy, and the political process, to name a few. In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful or undesirable. Ordinarily it is delusive to speak in terms of conduct which is per se contrary to public welfare.
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> The Boreta court, in footnote 22 at 2 Cal.3d 99, states:
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> "We do not mean to intimate that the Department [Department of Alcoholic Beverage Control] is confined to considering violations of criminal statutes or departmental directives as grounds for suspension or revocation under section 24200, subdivision (a). It is not disputed that while the Department

may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules, as constituting activities contrary to public welfare or morals, it may also act on situations contrary to the public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject or prior department announcement."

CONCLUSION

We conclude that appellants did not sustain their burden of showing that removal of the condition would not interfere with residential quiet enjoyment. As we also conclude that the Department reasonably proved it was satisfied the original circumstances which caused the original imposition still exist, the burden became appellant's, to show non-interference, which burden they did not sustain.

The decision of the Department is affirmed.[9-]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[9]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.-