

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

AB-9842

File: 21-456483; Reg: 18086948

SMART & FINAL STORES, LLC,
dba Smart & Final #368
5195 Clairemont Mesa Boulevard
San Diego, CA 92117-1446,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 7, 2020
Telephonic

ISSUED MAY 12, 2020

Appearances: *Appellant:* Joshua Kaplan, of the Law Office of Joshua Kaplan, as counsel for Smart & Final Stores, LLC,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Smart & Final Stores, LLC, doing business as Smart & Final #368 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ denying its petition to modify the conditions of its license.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department under Government Code section 11517(c), dated November 12, 2019, is set forth in the appendix, as well as the administrative law judge's proposed decision, dated April 6, 2019.

Appellant's off-sale general license was issued for the licensed premises in 2008. From 1999 to 2008, the license was held by a different, but related entity.

When issued, eight conditions were attached to the license. At least some of the conditions on the current license were carried forward from the previous license.

On March 8, 2017, appellant requested to modify three of the eight conditions. Appellant and the Department were able to resolve one of the modification requests, leaving only two of the eight conditions at issue. Those conditions are:

1. Beer, malt liquor and malt beverage product(s) shall not be sold in single containers but can be sold in the manufacturers' pre-packaged containers of four (4) or six (6) pack quantities for sale.
7. No wine product(s) shall be sold in containers less than 750 milliliters in size.

Appellant requested that the conditions be changed to read:

1. Beer, malt liquor, and malt beverage product(s) in containers less than 16 oz. cannot not be sold by single containers but must be sold in manufacturers pre-packaged multi-unit quantities.
7. No wine product(s) shall be sold in containers less than 750 milliliters in size except for wine-based coolers which can be sold in the manufacturers' multi-unit pre-packaged containers.

Evidence at the administrative hearing held on February 27, 2019 established that the license conditions were originally imposed on the basis that: 1) the census tract in which the premises is located was over-concentrated; 2) the San Diego Police Department (SDPD) protested the license because of over-concentration, and; 3) the premises or its parking lot were within 100 feet of nearby residences. SDPD withdrew its protest based on the imposition of the conditions.

Evidence also established that at the time of appellant's modification request,

there were five licenses in the census tract where the licensed premises is located, although only two licenses were permitted. Further, there were six residences located within 100 feet of the licensed premises or its parking lot at the time of the petition.

The Department notified SDPD of appellant's request to modify conditions on via letter dated April 14, 2017.² SDPD opposed appellant's request in a letter to the Department dated June 19, 2017.

Alexander Macksoud, appellant's store manager, testified that the community where the licensed premises is located has changed over the last three years. Macksoud testified that the average age of their customers has increased and that there were several new senior living facilities in the area. Macksoud also indicated that the area is less affluent and the number of "sale shoppers" has increased. As a result, the licensed premises now has twice as many sales as it did in the past. Due to these changes, appellant sought to modify its conditions to be able to sell smaller bottles of wine and single bottles of beer over 16 ounces.

The administrative law judge (ALJ) issued a proposed decision on April 6, 2019 recommending that appellant's petition to modify conditions be denied. On June 25, 2019, the Department declined to adopt the ALJ's proposed decision, and issued a notice on July 16, 2019 that it would decide the case pursuant to Government Code section 11517(c)(2)(E). On August 14, 2019, the Department requested written briefs

² The Department also notified the San Diego City Council in a letter dated April 17, 2017. However, the council did not respond.

addressing the impact of Business and Professions Code³ section 23803(b)⁴ on “the facts presented in the determination of whether a substantial change in the circumstances occurred ... to justify a modification of conditions?” (Notice at p. 1.)

Prior to the addition of subsection (b), section 23803 read:

The department ... *if it is satisfied that the grounds which caused the imposition of the conditions no longer exist*, shall order their removal or modification, provided written notice is given to the local governing body of the area in which the premises are located. The local governing body has 30 days to file written objections to the removal or modification of any condition. The department may not remove or modify any condition to which an objection has been filed without holding a hearing as provided in Chapter 5

(Emphasis added.)

As of January 1, 2019, the legislature added section 23803(b), which states:

For purposes of this section, a situation in which the “grounds that caused the imposition of the conditions no longer exist” includes, but is not limited to, the situation in which *there have been substantial changes in the totality of circumstances* such that the department determines that the current circumstances reasonably justify the modification or removal of the conditions.

(Emphasis added.)

After considering written arguments of the parties, the Department issued its decision under Government Code section 11517(c) on November 12, 2019 denying appellant’s petition to modify conditions on the basis that the census tract where the licensed premises is located is still over-concentrated and because there are still residences within 100 feet of the licensed premises or its parking lot. The Department

³ All statutory references are to the California Business and Professions Code unless otherwise stated.

⁴ Section 23803(b) was added to section 23803 and became effective January 1, 2019.

further found that “[t]here is no evidence that the changing demographics have had any effect, much less a positive one, upon the impact of the Licensed Premises on either [the level of over-concentration or the existence of nearby residences].” (Conclusions of Law, ¶ 6.)

Appellant filed a timely appeal contending that the Department erred in its application of section 23803 and that its modification petition should be granted.

DISCUSSION

Appellant contends that the Department misapplied the recently-amended section 23803. (AOB at pp. 8-16.) Specifically, appellant argues that:

What the Department has done in this case, however, is to totally nullify and repeal [the amendment of section 23803]. Prior to [this] amendment, if the tract in which the licensee operates was subject to undue concentration when license conditions were imposed and it is still subject to undue concentration when a condition modification is presented, no other changed circumstances were ever considered by the Department as justifying a modification. The Department simply decided that since undue concentration caused the imposition of conditions, if undue concentration still existed those conditions could no longer be modified notwithstanding community support, law enforcement support, political support or the blessings of a local religious institution.

(*Id.* at pp. 9-10.) Appellant further contends that the Department erred by considering SDPD’s objection, which came after the 30-day deadline for a local governing body to file an objection under section 23803. (*Id.* at pp. 15-16.) Ultimately, appellant posits that “substantial changes in the totality of circumstances” supports modification of the license. (*Id.* at p. 17.)

Section 23803(a) allows the Department to remove or modify the conditions of a license “if it is satisfied that the grounds that caused the imposition of the conditions no longer exist” Section 23803(a) also allows 30 days for a local governing body to file an objection. As stated above, section 23803(b) clarifies subsection (a), stating

that “ ‘grounds that caused the imposition of the conditions no longer exist’ includes, but is not limited to, the situation in which there have been substantial changes in the totality of circumstances such that the department determines that the current circumstances reasonably justify the modification or removal of the conditions.”

As a preliminary matter, the Board disagrees with appellant’s first contention that the Department misapplied section 23803(b). Subsection (a) would allow the Department to deny appellant’s modification petition simply if the grounds for the imposition of the conditions still existed—in other words, if there were still an overconcentration of licenses and residences within 100 feet of the licensed premises or its parking lot.

However, subsection (b) requires that the Department go beyond a determination of whether these grounds still exist and consider whether there have been “substantial changes in the totality of the circumstances.” This is exactly what the Department did in Conclusions of Law paragraph 6, where the Department considered that “the demographics of the surrounding community have changed.” The Board sees no error in the Department’s application of section 23803(b).

Similarly, the Board disagrees with appellant’s second contention that the Department erred in considering SDPD’s untimely objection. Section 23803(a) states that “[t]he local governing body⁵ has 30 days to file written objections to the removal or modification of any condition.” However, the next sentence of section 23803(a) makes

⁵ The Board agrees with the Department that it has not been established that SDPD is “the local governing body” as contemplated by the statute. Since the legislature used the term “the,” instead of “a,” it stands to reason that it envisioned a singular governing body, likely a municipality (city or county). However, for the reasons articulated below, this distinction is immaterial.

it clear that the 30-day time limit applies to whether the Department is required to hold a hearing. This pertinent portion of section 23803(a), when read as a whole, states:

The local governing body has 30 days to file written objections to the removal or modification of any condition. The Department may not remove or modify any condition to which an objection has been filed without holding a hearing

Given the proper context, it is clear that this portion of section 23803(a) was created to protect a local governing body's right to have a hearing after filing a timely objection, not to prohibit the Department from considering SDPD's objection under the "totality of circumstances." (See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 [87 Cal.Rptr.2d 222, 980 P.2d 927] ["we do not construe statutes in isolation, but rather read every statute with "reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." ' '], internal citations omitted.). Again, this Board sees no error.

Ultimately, appellant disagrees with the Department's finding that, under the totality of circumstances (i.e. the changed demographics, overconcentration of licenses, SDPD's objection, and nearby residences), current circumstances do not reasonably justify the modification the license conditions. However, ample legal authority requires this Board to defer to Department's findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible

inference in support thereof will be indulged. [Citations.]”; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].) Substantial evidence is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellant’s arguments that changed demographics justified modification of the license. (Conclusions of Law, ¶ 6.) To support its findings, the Department relied on evidence that the census tract where the license premises is located currently has five alcoholic beverage licenses (even though only two are permitted) and there were six residences within 100 feet of the license premises at the time appellant submitted its petition.⁶ (Findings of Fact, ¶¶ 10 and 12, Conclusions of Law, ¶ 6.) Further, evidence established that these issues existed at the time the license was issued and were the reasons the conditions were originally imposed. (Findings of Fact, ¶ 4.) Ultimately, the Department found that, under the totality of circumstances, the changed demographics were not enough to overcome the issues of overconcentration and nearby residences. (Conclusions of Law, ¶ 6.)

⁶ Although the Department said it considered SDPD’s objection to appellant’s proposed modification in Findings of Fact, paragraph 9, it did not include this issue as a basis for its decision in Conclusions of Law, paragraph 6. This further negates appellant’s contention that the Department erred in considering SDPD’s untimely objection.

The Board sees no error with the Department's finding that current circumstances do not justify the modification of appellant's license conditions. This finding is supported by evidence of five total licenses issued in the census tract, which only permitted two, and the existence of six residences within 100 feet of the licensed premises or its parking lot. This evidence is "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.) Ultimately, appellant is asking this Board to second-guess the Department and reach a different result, even though extensive legal authority prohibits us from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

ORDER

The decision of the Department is affirmed.⁷

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷ 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.

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.*

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE APPEAL BY:

SMART & FINAL STORES, LLC.
DBA: SMART & FINAL 368
5195 CLAIREMONT MESA BLVD
SAN DIEGO, CA 92117-1446

SAN DIEGO DISTRICT OFFICE

File: 21-456483

Reg: 18086948

AB: 9842

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on December 23, 2019, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

2019 DEC 26 PM 2:31
RECEIVED
ABC APPEALS DIVISION

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PETITION OF:

Smart & Final Stores LLC
dba Smart & Final 368
5195 Clairemont Mesa Blvd.
San Diego, California 92117-1446

Licensee(s).

**FOR THE MODIFICATION OF
CONDITIONS ON AN OFF-SALE
GENERAL LICENSE**

File No.: 21-456483

Reg. No.: 18086948

RECEIVED

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Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on November 12, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on February 27, 2019, before Administrative Law Judge Matthew G. Ainley, and the written arguments of the parties, adopts the following decision.

FINDINGS OF FACT

1. The Department issued a type 21, on-sale general license to the Petitioner for the above-described location in 2008 (the Licensed Premises), with a change in the Petitioner's membership in 2013. From 1999 to 2008, the license at this location was held by Smart & Final Stores Corporation, a different, but related, entity. The Petitioner operates a grocery store at the Licensed Premises. Its license has never been disciplined.
2. When issued, eight conditions were attached to the license. Three of these conditions are:
 1. Beer, malt liquor and malt beverage product(s) shall not be sold in single containers but can be sold in the manufacturers' multi-unit pre-packaged containers of four (4) or six (6) pack quantities for sale.
 5. No more than ten percent (10%) of the total floor space shall be devoted to the display and sales of alcoholic beverages, as depicted in the ABC-257 Diagram of Licensed Premises dated 01-08-99.

7. No wine product(s) shall be sold in containers less than 750 milliliters in size.

At least some of the conditions on the current license were carried forward from the previous license.

3. On March 8, 2017, the Petitioner requested that all three of these conditions be modified. At the start of the hearing, the Department and the Petitioner indicated that the request to modify condition 5 had been resolved.

4. The conditions were originally imposed on the basis that (a) the census tract in which the premises is located was over-concentrated, (b) the San Diego Police Department protested issuance of the license due to over-concentration, and (c) the premises or its parking lot were within 100 feet of nearby residences. San Diego Police Department withdrew its protest based on the imposition of the conditions.

5. With respect to condition 1, the Petitioner requested that the language be changed such that it reads:

Beer, malt beverages, and malt beverage product(s) in containers less than 16 oz. cannot be sold by single containers but must be sold in manufacturer pre-packaged multi-unit quantities.

With respect to condition 7, the Petitioner requested that the language be changed such that it reads:

No wine product(s) shall be sold in containers less than 750 ml in size except for wine-based coolers which can be sold in the manufacturers' multi-unit pre-packaged containers.

6. The request to modify condition 7 is based on a misunderstanding about the products known as coolers. Originally, coolers were known as wine coolers and were wine-based products. A number of years ago, wine-based coolers disappeared from the market. Currently, the overwhelming majority of coolers—if not all of them—are malt-based products. As malt-based products, coolers are not covered by condition 7, but by condition 1. Even without modification, this condition permits the sale of coolers in manufacturers' multi-unit pre-packaged containers.

7. During the hearing, the Petitioner indicated that it also wanted condition 7 modified to permit sales of small containers of wine in manufacturers' multi-unit pre-packaged containers. (Exhibit C.)

8. The Department notified the San Diego City Council and San Diego P. D. of the request to modify conditions. San Diego City Council was notified by a letter dated April 17, 2017, but did

not respond. San Diego Police Department was notified by a letter dated April 14, 2017, and responded by a letter dated June 19, 2017. In this letter, San Diego Police Department opposed the request.

9. Although the Petitioner's Motion in Limine to exclude all testimony and evidence concerning the objection of the San Diego Police Department was granted on the record by the ALJ at hearing, section 23803 only requires the Department to hold an administrative hearing prior to granting a condition modification request if a local body objects to the petition within 30 days of notification. The Department is unsure whether a local police department qualifies as a local governing body under this section. Regardless, this section does not preclude the Department from considering an objection by a local governing body as a part of its investigation or at an administrative hearing if the objection was received after the 30-day period. Although evidence of the San Diego Police Department objection included within the record has been considered, the ultimate result would be the same even without this evidence being considered.

10. Although the census tract in which the Licensed Premises is located was over-concentrated pursuant to section 23958.4 when the license issued, the Department did not have any statistics concerning the number of licenses in the census tract in either 1999 or 2008. The Department also did not have any statistics which might establish the over-concentration threshold in 1999 or 2008. When the request to modify conditions was submitted, the census tract in which the Licensed Premises is located had five licenses, although only two are permitted. In other words, the census tract is currently over-concentrated by license count.

11. Neither the Department nor the Petitioner presented any evidence whether the reporting district in which the Licensed Premises is located qualified as a high-crime reporting under section 23958.4 at present or in either 1999 or 2008.

12. There were a number of residences located within 100 feet of the Licensed Premises or its parking lot when the license issued. The Department did not know the number of such residences or their location in 1999 or 2008. At the time the Petitioner submitted its request to modify conditions, there were six such residences. The Department mailed notification letters to each residence. The Department did not receive any response thereto.

13. The existence of consideration points was **not** one of the grounds upon which the conditions were imposed. Accordingly, it is irrelevant to the request to modify conditions whether such a consideration point currently exists or whether it objects or not. Nevertheless, the Department contacted the Church of the Nazarene, which is located within 600 feet of the Licensed Premises. No one from the church responded.

14. Because the census tract in which the Licensed Premises is located is still over-concentrated, and because there are still residences within 100 feet of the Licensed Premises or its parking lot,

the Department denied the Petitioner's request on the basis that the grounds for the imposition of the conditions continued to exist.

15. Alexander Macksoud, the store manager at the Licensed Premises, testified that the community surrounding the Licensed Premises has changed over the last three years. Macksoud testified that the average age of their customers has increased, reflecting the fact that the community has gotten older. There are a number of senior living facilities in the area, some of which were built in the last three years. The number of buses transporting residents of these facilities to the Licensed Premises has increased during this time.

16. Macksoud also indicated that the area is less affluent than in years past. Among other things, the number of "sale shoppers" has increased. In response, the Licensed Premises now has twice as many sales as in the past.

17. In light of its changing customer base, the Petitioner wanted to be able to sell smaller bottles of wine and single bottles of beer over 16 ounces. Macksoud indicated that this desire arises from customer requests.

18. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution provides that the Department of Alcoholic Beverage Control has the power, in its discretion, to deny an application for an alcoholic beverage license if it determines for good cause that the granting of the license would be contrary to public welfare or morals.

2. Section 23800 provides that "[t]he department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges . . . [i]f grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions."

3. Previously, section 23803 provided that "[t]he department, upon its own motion or upon the petition of a licensee[,] . . . if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification."

4. Section 23803 was amended effective January 1, 2019. Section 23803(a) contains the language cited in the preceding paragraph. A new subsection, 23803(b), was added. Subsection 23803(b) provides that "a situation in which the 'grounds that caused the imposition of the

conditions no longer exist' includes, but is not limited to, the situation in which there have been substantial changes in the totality of circumstances such that the department determines that the current circumstances reasonably justify the modification or removal of the conditions."

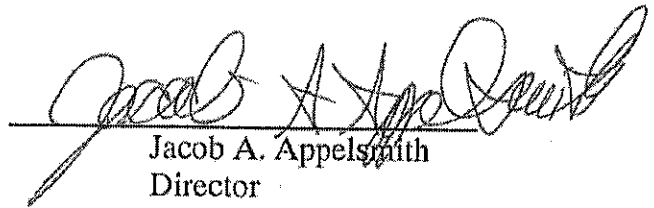
5. Under the old language, the Petitioner's request to modify its conditions would be denied. At the time the license issued, the census tract in which the Licensed Premises is located was over-concentrated, there were a number of residences within 100 feet, and San Diego P.D. objected to the license being granted without the conditions in place. While it is unclear whether the level of over-concentration or the number of nearby residences has changed, the facts established that the grounds which caused the imposition of the conditions continue to exist. (Findings of Fact ¶¶ 2-5, 7-12 & 14.)

6. Looking at the new standard set forth in section 23803(b), the question becomes whether there have been *substantial* changes in the totality of circumstances such that the Department determines that the current circumstances reasonably justify the modification of the conditions. In the present case, the evidence established that the demographics of the surrounding community have changed. (Findings of Fact ¶¶ 15-18.) While the changing demographics may have affected the type of customer who frequents the Licensed Premises and the demand for certain types of products, they do not relate to either the level of over-concentration or the existence of nearby residences. There is no evidence that the changing demographics have had any effect, much less a positive one, upon the impact of the Licensed Premises on either issue.

ORDER

The Petitioner's request to remove or modify conditions 1 and 7 is hereby denied.

Dated: November 13, 2019



Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE PETITION OF:

SMART & FINAL STORES LLC
SMART & FINAL 368
5195 CLAIREMONT MESA BLVD
SAN DIEGO, CA 92117-1446

FOR THE MODIFICATION OF CONDITIONS ON
THE OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

SAN DIEGO DISTRICT OFFICE

File: 21-456483

Reg: 18086948

CERTIFICATE OF DECISION

NOTICE CONCERNING PROPOSED DECISION

To the parties in the above-entitled proceedings:

You are hereby advised that the Department considered, but did not adopt, the Proposed Decision in the above titled matter and that the Department will itself decide the case pursuant to the provisions of Section 11517(c)(2)(E). A copy of the Proposed Decision has previously been sent to all parties.

The Department has requested that a transcript of the hearing be prepared. A copy of the record will be made available to you. Upon receipt of the hearing transcript, the Department will notify you of the cost of a copy of the record. At that time you all also be advised of the date by which written argument if any, is to be submitted.

Sacramento, California

Dated: July 16, 2019



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE PETITION OF:

Smart & Final Stores LLC
dba Smart & Final 368
5195 Clairemont Mesa Blvd.
San Diego, California 92117-1446

FOR THE MODIFICATION OF CONDITIONS ON
AN OFF-SALE GENERAL LICENSE

Under the Alcoholic Beverage Control Act

} File: 21-456483
}
} Reg.: 18086948
}
} License Type: 21
}
} Word Count: 11,000
}
} Reporter:
} Brywn Whatford
} Kennedy Court Reporters

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office,
Department of Alcoholic Beverage Control, heard this matter at San Diego, California,
on February 27, 2019.

Sean D. Klein, Attorney, represented the Department of Alcoholic Beverage Control.

Joshua Kaplan, attorney-at-law, represented petitioner Smart & Final Stores LLC.

The Petitioner seeks to remove or modify the conditions attached to its license as permitted by Business and Professions Code section 23803¹ on the basis that the grounds which caused the imposition of such conditions no longer exist. (Exhibit 1.)

The Department denied the Petitioner's request, after which the Petitioner requested a hearing.

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on February 27, 2019.

FINDINGS OF FACT

1. The Department issued a type 21, on-sale general license to the Petitioner for the above-described location in 2008 (the Licensed Premises), with a change in the

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

Respondent's membership in 2013. From 1999 to 2008, the license at this location was held by Smart & Final Stores Corporation, a different, but related, entity. The Respondent operates a grocery store at the Licensed Premises. Its license has never been disciplined.

2. When issued, eight conditions were attached to the license. Three of these conditions provide:

1. Beer, malt liquor and malt beverage product(s) shall not be sold in single containers, but can be sold in the manufacturers' multi-unit pre-packaged containers of four (4) or six (6) pack quantities for sale.
5. No more than ten percent (10%) of the total floor space shall be devoted to the display and sales of alcoholic beverages, as depicted in the ABC-257 Diagram of Licensed Premises dated 01-08-99.
7. No wine product(s) shall be sold in containers less than 750 milliliters in size.

At least some of the conditions on the current license were carried forward from the previous license.

3. On March 8, 2017, the Respondent requested that all three of these conditions be modified. At the start of the hearing, the Department and the Respondent indicated that the request to modify condition 5 had been resolved.

4. The conditions were originally imposed on the basis that (a) the census tract in which the premises is located was over-concentrated, (b) the San Diego Police Department protested issuance of the license due to over-concentration, and (c) the premises or its parking lot were within 100 feet of nearby residences. San Diego P. D. withdrew its protest based on the imposition of the conditions.

5. With respect to condition 1, the Respondent requested that the language be changed such that it reads:

Beer, malt beverages, and malt beverage product(s) in containers less than 16 oz. cannot be sold by single containers, but must be sold in manufacturer pre-packaged multi-unit quantities.

With respect to condition 7, the Respondent requested that the language be changed such that it reads:

No wine product(s) shall be sold in containers less than 750 ml in size except for wine-based coolers which can be sold in the manufacturers' multi-unit pre-packaged containers.

6. The request to modify condition 7 is based on a misunderstanding about the products known as coolers. Originally, coolers were known as wine coolers and were wine-based products. A number of years ago, wine-based coolers disappeared from the market. Currently, the overwhelming majority of coolers—if not all of them—are malt-based products. As malt-based products, coolers are not covered by condition 7, but by condition 1. Even without modification, this condition permits the sale of coolers in manufacturers' multi-unit pre-packaged containers.
7. During the hearing, the Respondent indicated that it also wanted condition 7 modified to permit sales of small containers of wine in manufacturers' multi-unit pre-packaged containers. (Exhibit C.)
8. The Department notified the San Diego City Council and San Diego P. D. of the request to modify conditions. San Diego City Council was notified by a letter dated April 17, 2017, but did not respond. San Diego P. D. was notified by a letter dated April 14, 2017 and responded by a letter dated June 19, 2017. In this letter, San Diego P. D. opposed the request.
9. Section 23803 provides that the local governing body has 30 days in which to file written objections to a request to modify conditions. It appears that San Diego P. D. was notified (along with the city council) under this section. Since San Diego P. D. did not submit its objection until 66 days later, its objection is untimely and not considered.
10. Although the census tract in which the Licensed Premises is located was over-concentrated pursuant to section 23958.4 when the license issued, the Department did not have any statistics concerning the number of licenses in the census tract in either 1999 or 2008. The Department also did not have any statistics which might establish the over-concentration threshold in 1999 or 2008. When the request to modify conditions was submitted, the census tract in which the Licensed Premises is located had five licenses, although only two are permitted. In other words, the census tract is currently over-concentrated by license count.
11. Neither the Department nor the Respondent presented any evidence whether the reporting district in which the Licensed Premises is located qualified as a high-crime reporting under section 23958.4 at present or in either 1999 or 2008.
12. There were a number of residences located within 100 feet of the Licensed Premises or its parking lot when the license issued. The Department did not know the number of such residences or their location in 1999 or 2008. At the time the Respondent submitted its request to modify conditions, there were six such residences. The Department mailed

notification letters to each residence. The Department did not receive any response thereto.

13. The existence of consideration points was **not** one of the grounds upon which the conditions were imposed. Accordingly, it is irrelevant to the request to modify conditions whether such a consideration point currently exists or whether it objects or not. Nevertheless, the Department contacted the Church of the Nazarene, which is located within 600 feet of the Licensed Premises. No one from the church responded.

14. Since the census tract in which the Licensed Premises is still over-concentrated and since there are still residences within 100 feet of the Licensed Premises or its parking lot, the Department denied the Respondent's request on the basis that the grounds which caused the imposition of the conditions continued to exist.

15. Alexander Macksoud, the store manager at the Licensed Premises, testified that the community surrounding the Licensed Premises has changed over the last three years. Macksoud testified that the average age of their customers has increased, reflecting the fact that the community has gotten older. There are a number of senior living facilities in the area, some of which were built in the last three years. The number of buses transporting residents of these facilities to the Licensed Premises has increased during this time.

16. Macksoud also indicated that the area is less affluent than in years past. Among other things, the number of "sale shoppers" has increased. In response, the Licensed Premises now has twice as many sales as in the past.

17. In light of its changing customer base, the Respondent wanted to be able to sell smaller bottles of wine and single bottles of beer over 16 ounces. Macksoud indicated that this desire arises from customer requests.

18. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution provides that the Department of Alcoholic Beverage Control has the power, in its discretion, to deny an application for an alcoholic beverage license if it determines for good cause that the granting of the license would be contrary to public welfare or morals.

2. Section 23800 provides that "[t]he department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges . . . [i]f grounds

exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions.”

3. Previously, section 23803 provided that “[t]he department, upon its own motion or upon the petition of a licensee[,] . . . if it is satisfied that the grounds which caused the imposition of the conditions no longer exist, shall order their removal or modification.”

4. Section 23803 was amended effective January 1, 2019. Section 23803(a) contains the language cited in the preceding paragraph. A new subsection, 23803(b), was added. Subsection 23803(b) provides that “a situation in which the ‘grounds that caused the imposition of the conditions no longer exist’ includes, but is not limited to, the situation in which there have been substantial changes in the totality of circumstances such that the department determines that the current circumstances reasonably justify the modification or removal of the conditions.”

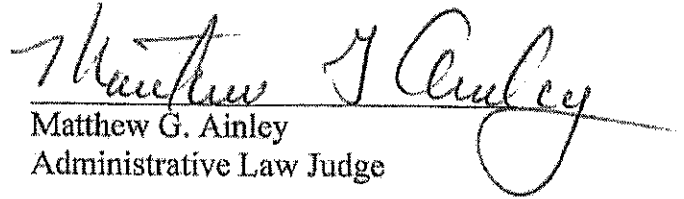
5. Under the old language, the Respondent’s request to modify its conditions must be denied. At the time the license issued, the census tract in which the Licensed Premises is located was over-concentrated and there were a number of residences within 100 feet. While it is unclear whether the level of over-concentration or the number of nearby residences has changed, the facts established that the grounds which caused the imposition of the conditions continue to exist. (Findings of Fact ¶¶ 2-5, 7, 10-12 & 14.)

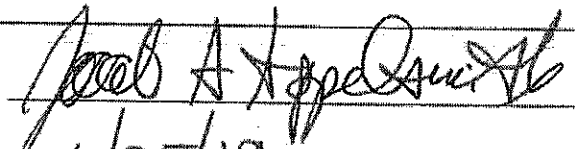
6. Looking at the new standard set forth in section 23803(b), the question becomes whether there have been *substantial* changes in the totality of circumstances such that the Department determines that the current circumstances reasonably justify the modification of the conditions. In the present case, the evidence established that the demographics of the surrounding community have changed. (Findings of Fact ¶¶ 15-18.) While the changing demographics may have affected the type of customer who frequents the Licensed Premises and the demand for certain types of products, they do not relate to either the level of over-concentration or the existence of nearby residences. There is no evidence that the changing demographics have had any effect, much less a positive one, upon the impact of the Licensed Premises on either issue.

ORDER

The Petitioner's request to remove or modify conditions 1 and 7 is hereby denied.

Dated: April 6, 2019


Matthew G. Ainley
Administrative Law Judge

<input type="checkbox"/> Adopt
<input checked="" type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>6/25/19</u>

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

SMART & FINAL STORES, LLC,
dba Smart & Final #368
5195 Clairemont Mesa Boulevard
San Diego, CA 92117-1446,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9842
)
) File: 21-456483
) Reg: 18086948
)

**DECLARATION OF SERVICE
BY MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 1325 J Street, Suite 1560, Sacramento, CA; that on the 12th day of May, 2020, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Joshua Kaplan
Law Office of Joshua Kaplan
11835 W. Olympic Boulevard
Suite 1125E
Los Angeles, CA 90064
jk@joshuakaplanlaw.com

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on the 12th day of May, 2020.

Maria Sevilla

MARIA SEVILLA