ISSUED OCTOBER 14, 1999

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

SAN DIEGO MARVIN GARDENS dba The Flame 3778-3782 Park Boulevard San Diego, California 92103, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7215 File: 48-151822 Reg: 97041545 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: August 12, 1999 Los Angeles, CA

San Diego Marvin Gardens, doing business as The Flame (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale general public premises license for 20 days, all stayed for a probationary period of two years of discipline-free operation, for having permitted the premises to be operated as a disorderly house, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25601.

Appearances on appeal include appellant San Diego Marvin Gardens,

[1]The decision of the Department, dated August 6, 1998, is set forth in the appendix.

appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 23, 1984. Thereafter, on October 22, 1997, the Department instituted an accusation against appellant charging, in three counts, that appellant: operated the premises as a disorderly house (count 1); failed to take reasonable steps to correct objectionable conditions on the licensed premises after notice thereof (count 2); and operated the premises in such manner as to create a public nuisance (count 3.)

An administrative hearing was held on May 11 and 12, 1998, following which the Department issued its decision sustaining only the disorderly house charge in count 1, ordering the stayed suspension, and imposing four conditions on the license, pursuant to Business and Professions Code §23800, subdivision (b), as follows:

> "A. Entertainment provided shall not be audible outside the building structure which houses the licensed premises.
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> "B. Each day of the week its business is open, respondent shall provide one state-licensed security guard between the hours of 10:00 p.m. and one-half hour after closing who shall be stationed on the sidewalk in front of the building structure which houses the licensed premises in order [sic] maintain order on that sidewalk and prevent any activity which would interfere with the quiet enjoyment of their property by nearby residents. Said security guard shall be clothed in such a manner as to be readily identifiable as security. This security guard is to be separate and apart from any security personnel otherwise provided for the purpose of ensuring order inside the premises.
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> "C. Respondent shall remind its patrons, using the in-house public address system, each day at the time 'last call' is announced or fifteen minutes prior

to closing, whichever comes first, that they are expected to exit the location quickly and quietly, giving consideration to the quiet enjoyment of their property by nearby residents.

"D. Respondent shall continue its practice of using all on-duty employees, except bar backs, to exit the premises at closing as the patrons are leaving in order to maintain order in the neighborhood."

Appellant has filed a timely notice of appeal. Appellant's brief states that "[a]ppellant accepts conditions C and D but has a limited objection to and/or seeks to modify conditions A and B." Appellant further states in its brief that its appeal "is limited to the reasonableness of the aforesaid conditions on their face, within the evidentiary context of this case and the 'reasonably related' criterion of California Business and Professions Code §23800 (b)."

DISCUSSION

Appellant seeks to delete or modify two of the four conditions imposed on its license following a determination by the Department that appellant's premises has operated as a disorderly house, primarily resulting from music and patron noise at a level which elicited numerous complaints from two residents of an apartment building adjacent to the premises. The conditions in question are those requiring that entertainment not be audible outside the building structure housing the licensed premises (condition A) and that appellant station a state-licensed security guard outside the premises during certain evening hours (condition B). Appellant asserts that these two conditions are unreasonable unless modified in the manner appellant suggests. Appellant would add to condition A the phrase "to the extent such would violate the San Diego Municipal Code Noise Ordinance," and would eliminate from condition B the requirement that the guard be a state-licensed security guard.

Since appellant has not contested the merits of the determination that the premises were operated as a disorderly house, the issues before the Appeals Board turn on whether the conditions imposed on the license are reasonable.

The authority of the Department to impose conditions on a license is set forth in Business and Professions Code §23800. The test of reasonableness as set forth in §23800, subdivision (b), is that "[w]here findings are made by the department which would justify a suspension or revocation of a license, and where the imposition of a condition is reasonably related to those findings. ..." Section 23801 states that the conditions "may cover any matter...which will protect the public welfare and morals...."

The Appeals Board has traditionally viewed the words "reasonably related" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link,"[2] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

Appellant contends, and with considerable support in the record, that it has done much to ensure that the quiet enjoyment of their property by nearby residents is protected. But appellant's good faith is not the entire issue. There is no question but that noise from the amplified music in the premises has disturbed at least some of those nearby residents. There is considerable support in the record for this as well.

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[2]See Webster's Third New International Dictionary, 1986, page 1524.

That only two residents were willing to voice their complaints does not mean that no one else was disturbed.

Appellant argues that it is of "crucial importance" that the two residents complained they were disturbed by "bass vibration and not music noise" [App.Br., page 13] (emphasis in original). Therefore, argues appellant, there is no reasonable evidentiary basis for the condition requiring that entertainment provided shall not be audible outside the building structure. Appellant would, instead, qualify the restriction so as to apply only to any sound level violative of the San Diego municipal code noise ordinance. Appellant introduced a report (Exhibit C) of measured sound levels showing that, on the night the measurements were taken, the levels did not violate the city's noise ordinance.

The suggestion that the residents were bothered by vibrations rather than music noise is contrary to the record. Counsel's attempt to elicit testimony to that effect was rebuffed by Leslie Ann Neff, one of the complainants [I RT 74-75]:

> Q: With regard to the noise disturbances then, would it be a fair characterization to say that what you have experienced as disturbing would be from the interior of the premises, the music?
>
> A: Correct.
>
> Q: And more particularly, it would be the bass tones of the music, would it not?
>
> A: In general, yes.
>
> Q: I mean, that's really what you can almost sense. It's --
>
> A: It's louder than sometimes the music or the deejay talking out of the microphone.
>
> Q: Right. Is that something that's like a vibration. You can almost sense it rather than hear it?
>
> A: No. You hear it.

Q: Both or just hear it?

A: Both.

Q: And that would be really what is the most repetitive disturbing element, isn't it?

A: Correct.

Although appellant has spent substantial sums in its efforts to control or eliminate noise problems, including additional soundproofing on the building structure and the installation of noise limiters on the audio equipment, it seems clear that the noise problem persists. The question, then, is whether it is reasonable to require more, and, specifically, whether the condition the Department would impose is reasonable.

The evidence suggests that the noise problem is, in large part, due to conscious choices about the entertainment format the premises has adopted. As explained in the testimony of Glynda Coats, the disk jockey employed by appellant [II RT 7-8]:

> Q: ... [M]ay I assume that you have become familiar with changes in recorded music, styles, types of music?
>
> A: Definitely. ...
>
> ...
>
> Q: ...Over the course of the last several years, let's use the last three, have you noticed any change in the style of music that is popular in dance clubs?
>
> A: Yes.
>
> Q: In connection with that change in style, have you noticed any difference in the -- particularly, the bass levels of recorded music as it comes to you prerecorded?
>
> A: Yes, 100 percent.
>
> Q: What's happened? What's the change?
>
> A: It is the pressing of the records has changed. It's become very bassy, very prominent to have the bass. That's what it's all about. When I hear the cars going by on the road, I can hear it. Like you used to not be able to hear it. It's

just bass.

Q: Okay. So do I get you to be telling us that over the last three years or so, dance music has altered to emphasize the bass tones?

A: That's correct.

Q: Was that true before three years ago?

A: It's -- house music's become a lot more popular, so the bass has really gone up. Tribal music, it's called, has come into play, and it's basically all drums. So I would say over the last three years, that's become a prominent type of music, the tribal bass music for dance.

As noted above, appellant proposes a revision to condition A (that entertainment not be audible outside the building structure) by adding the proviso that it not be audible to the extent that it would violate the San Diego municipal code noise ordinance. The Department has refused to do so. We believe the Department's objections to the modification are valid. The decibel level was measured only once, under conditions that may or may not be typical, so the results of that single measurement are of little weight. As the Department's brief explains, the nearby residents would have no practical remedy against excessive noise, in light of the difficulties in proving that the disturbing bass tones exceeded the city's permissible levels.

Appellant objects to the requirement that it post a state-licensed security guard at the entrance to the premises between 10:00 p.m. and one-half hour after closing on the days the premises are open. It suggests that this requirement should apply only to Saturdays, and that the secutity guard need not be state-licensed.

Appellant claims there were only two documented references to patron noise or disturbance, and argues that the record shows that appellant has been able to control noise without such a requirement.

Appellant is correct that patron noise has been of much less concern to the

residents who complained, and that it has taken steps to control the problem, including the hiring of its own security. The Department's evidence of such problems is for the most part general and abstract in nature. Nonetheless, with several documented instances (appellant suggests only two, the record suggests more) of such disturbances, and the potential of such inherent in the fact that appellant draws up to 400 patrons on its busy evenings, it is difficult to fault the Department's judgment that the presence of a state-licensed security guard during the most critical hours would alleviate or eliminate such problems in the future. On the state of the record, it cannot be said that the Department acted unreasonably.

ORDER

The decision of the Department is affirmed.[3]

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

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[3] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.