

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

AB-9885

File: 21-588216; Reg: 19089467

HARDIP SINGH,
dba A & M Food and Liquor
1838 Auburn Boulevard
Sacramento, CA 95815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: January 8, 2021
Telephonic

ISSUED JANUARY 13, 2021

Appearances: *Appellant:* Richard D. Warren, as counsel for Hardip Singh,

 Respondent: Patrice Huber, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Hardip Singh, doing business as A & M Food and Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department),¹ denying his Petition to Modify Conditions (Petition).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 9, 2018, following a person-to-person transfer of the license which included the conditions originally imposed on the previous licensee. On January 17, 2019, appellant filed a Petition to

¹The decision of the Department, dated June 3, 2020, is set forth in the appendix.

remove two of those conditions (exh. D-1), on the basis that the grounds that necessitated the imposition of the conditions no longer existed. Appellant sought to remove the following conditions:

2. No beer or malt beverage products shall be sold, regardless of container size, in quantities of less than six per sale.
7. No distilled spirits shall be sold in bottles or containers smaller than 750 ml.

The Department conducted an investigation to determine whether the Petition should be granted. The Sacramento Police Department (SPD) submitted a letter protesting removal of the conditions on February 13, 2019 (exh. D-3), noting law enforcement problems, vandalism, loitering, littering, crime, homeless, and transients in the area. (RT at pp. 31-32; exh. D-3.)

At the administrative hearing held on February 13, 2020, documentary evidence was received and testimony concerning the investigation and the surrounding neighborhood was presented by Department Licensing Representative Elizabeth Gavia; SPD Administrative Analyst Dawn Stolarow; SPD Officers Jesus Trejo and Andrew Kahler; SPD Social Services Administrator Bridgette Dean; SPD Captain Steve Oliveira; and SPD Lieutenant Jason Start.

Sondra Betancourt, President of the Ben Ali Community Association; Shoun Thao, council representative for Sacramento City Council Member Warren; Daniel Salava, former council representative for Sacramento City Council Member Warren; Bud Lawley, a resident living directly behind the licensed premises; John Hogan, a long-time acquaintance, and licensee Hardip Singh testified on behalf of appellant. Appellant was not represented by legal counsel at the administrative hearing.

Testimony established that the license was previously held by a different owner with conditions that were imposed as a result of a protest filed by the SPD in 2014. During the person-to-person transfer of the license to appellant in 2017, the Department determined that the existing conditions were still applicable, so those conditions were included in the Petition for Conditional License which was signed by appellant on December 18, 2017. (Exh. D-2.) The conditions were as follows:

1. Sales and service of alcoholic beverages shall be permitted only between the hours of 8:00 a.m. and 11:00 p.m. each day of the week.
2. No beer or malt beverage products shall be sold, regardless of container size, in quantities of less than six per sale.
3. Wine shall not be sold in bottles or containers smaller than 750 ml. and wine-coolers, beer coolers, or pre-mixed distilled spirit cocktails (if allowed by the license) must be sold in manufacturer pre-packaged multi-unit quantities.
4. No wine shall be sold with an alcohol content of greater than 15% by volume except for "Dinner Wines" which have been aged two years or more and maintained in corked bottles.
5. No pay phone will be maintained on the interior or exterior of the premises.
6. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee(s).
7. No distilled spirits shall be sold in bottles or containers smaller than 750 ml.

(Ibid.)

The premises is a convenience store, located in a single-story, stand-alone building surrounded by a parking lot, in a mixed use (commercial and residential) zone containing primarily industrial businesses but including residences within 100 feet of the premises.

Appellant's witnesses testified that he has made numerous improvements to the premises, including: exterior lighting and maintenance, cleaning both the interior and exterior, improved shelving, and increasing the variety of goods for sale. Testimony also established that signage regarding the purchase of alcohol has been improved, the parking lot is kept free of debris (exhs. A-19 through 23), and that active steps were taken by appellant to prevent loitering and open container incidents in the areas under his control. Multiple neighbors, neighborhood groups, and organizations submitted letters supporting appellant and citing his operation of the premises in a responsible manner as a positive for the neighborhood. (Exhs. A-8 through A-18.)

The administrative law judge (ALJ) issued a proposed decision on March 2, 2020, denying the Petition and reaching the following conclusions:

7. At the time the type 21 Petition for Conditional License was presented to the Petitioner for issuance as a conditional license, the Department determined that there was substantial evidence from the SPD that identifiable problems existed that needed conditions to mitigate. The evidence was that there was a substantial transient and homeless problem in the area and that conditions were needed to address associated problems with this population. As a result of these "whereas" findings, seven conditions were imposed on the license sought. The Petitioner initially agreed with these determinations, and the conditions designed to mitigate their impact on the surrounding residences, when it signed the petition for conditional license on December 18, 2017. (Findings of Fact ¶¶ 1-13)

8. The conditions in question were directly designed to protect the people and neighborhood in the immediate area surrounding the Licensed Premises. The conditions, including the ones at issue in this petition, are all tailored to prevent the behavioral problems associated with the significant portion of the transient and homeless population that also suffers from alcohol and drug abuse issues. (Findings of Fact ¶¶ 1-13)

9. The burden is on the Petitioner is to establish changed circumstances such that the imposed conditions would no longer be necessary. By all appearances, the circumstances that led to the previously imposed conditions continue to exist today. The Licensed Premises is still within 100 feet of multiple residences and remains surrounded by a mixed-use

community. That community is struggling with an enormous homeless population. The Licensed Premises still exercises type 21 privileges and persons from the homeless and transient population remain potential customers. This privilege to sell alcohol, if unregulated, has the potential to contribute to public welfare issues caused by the substantial homeless and transient population that has entrenched itself in the surrounding community. Many of these homeless and transient individuals have alcohol and drug abuse challenges. The conditions at issue are designed to combat alcohol abuse, loitering, and panhandling issues associated with single sale beers and portable distilled spirits sought out by this population. The Petitioner has not shown changed circumstances that would justify revisiting the conditions imposed by the Department. (Findings of Fact ¶¶ 1-13)

10. It is clear that the Licensed Premises is a well-run operation. The Petitioner has not contributed to the problems associated with the homeless and transient population. However, the mere fact that it is well run is insufficient to justify the modification of the operative conditional license. The legal standard for modifying conditions is whether the grounds which caused the imposition of conditions have changed. The conditions have not changed, and the restrictions continue to be necessary. Evidence that surrounding residents have not experienced problems created by the Licensed Premises suggests that the conditions restricting single unit sales have been a benefit. (Findings of Fact ¶¶ 1-13)

11. It is the Petitioner's burden to establish that the underlying grounds have changed. The Petitioner has failed to do so in this case. (Findings of Fact ¶¶ 1-13)

(Conclusions of Law, ¶¶ 7-11.)

The Department adopted the proposed decision in its entirety on May 29, 2020 and issued a certificate of decision on June 3, 2020.

Appellant then filed a timely appeal raising the following issues: (1) the conditions are void because they were imposed in excess of the Department's authority; (2) the SPD did not provide substantial evidence to support its original request for conditions; (3) section 23803 is not applicable and appellant is not required to show that conditions have changed; and (4) the conditions are unenforceable because no reasons were given for their original imposition. These issues will be discussed together.

DISCUSSION

I

REQUEST FOR OFFICIAL NOTICE

As an initial matter, appellant filed a Request for Official Notice—in addition to his opening and closing briefs—asking that the Board take official notice of several previous Appeals Board cases. Appellant also requested that the Board take official notice of licensing information obtained as a result of a Public Records Act request to the Department. Alternatively, appellant requested that the Board remand the matter to the Department so that additional evidence can be presented and made part of the record.

Appellant cites Government Code section 11515 as authority for his request for official notice. That section states, in pertinent part:

In reaching a decision[,] official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency's special field, and of any fact which may be judicially noticed by the courts of this State . . .

(CA Gov. Code, §11515.)

The Department objects to the Request for Official Notice and maintains the Board lacks the authority to take official notice, citing Business and Professions Code section 23083(a) which states, in pertinent part:

(a) The board shall determine the appeal upon the record of the department and upon any briefs which may be filed by the parties. . . .
The board shall not receive any evidence other than that contained in the record of the proceedings of the department.

(Bus. & Prof. Code, §23083(a), emphasis added.) The only exception to this rule is when evidence is offered which either could not be produced, or should have been admitted, at the administrative hearing:

The review by the board of a decision of the department shall be limited to the questions . . . [w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.

(Bus. & Prof. Code, §23084(e).) In such a case:

In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence

(Bus. & Prof. Code, §23085.)

We agree with the Department that the Board lacks the authority to take official notice of the requested materials, and that no showing has been made that this evidence could not have been produced at the administrative hearing. Accordingly, the request for official notice is denied.

In regards to the Board's previous cases, however, while we may not take "official notice" of those matters, we do (as always) take guidance from previous matters heard and decided by the Board, and regard them as persuasive authority. As one court of appeals noted in regards to our decisions: "although we are not bound by the Appeals Board's decisions, we take judicial notice of the cited decisions and consider their reasoning for persuasive value." (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2017) 7 Cal.App.5th 628, 639 [213 Cal.Rptr.3d 130].) The Board is likewise guided by the reasoning of our previous decisions and need not take official notice of such decisions in order to discuss them.

We have also considered the request for remand, but decline to do so for reasons articulated below.

II

PETITION TO REMOVE CONDITIONS

Appellant contends the original SPD request for conditions to be imposed on the 2014 license (subsequently transferred to appellant with those same conditions) was not supported by substantial evidence. (AOB at p. 1.)

The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101

Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212

Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence when raised by an appellant, leads to an examination by the Appeals Board to determine, 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. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at p. 114.)

Appellant contends the conditions imposed on its license as a result of the SPD's request in 2014 were not supported by substantial evidence and were thus improperly imposed. Appellant argues, therefore, that the previous conditions were void from the beginning, and improperly carried over to appellant in 2017 because they were not accompanied by a new request from the SPD justifying the imposition of conditions. (AOB at p. 2.)

Appellant also contends the reasons for conditions being imposed on the license are too vague to be enforced. (AOB at p. 3.) Appellant maintains that since the "whereas clauses" in the Petition for Conditional License fail to state the reasons for the conditions, it is unfair to require appellant to prove that the reasons for the conditions no longer exist. (*Ibid.*) Appellant also contends section 23803 is not applicable and that he is not required to show that conditions have changed. (*Ibid.*)

For all these reasons, appellant requests that the Board reverse the Department's decision entirely. Alternatively, appellant asks that the Board remand the decision to the Department for the taking of additional evidence on these points.

Business and Professions Code section 23800 outlines the circumstances in which the Department may impose conditions on a license. Subdivision (e) of that section was amended to allow local law enforcement to request conditions (effective

January 1, 2001) but was applicable at that time only to premises-to-premises transfers under sections 24071.1 and 24071.2. Person-to-person transfers are governed by section 24070.

Section 23800(e) was amended in 2012 (effective January 1, 2013) to allow conditions to be added to a license during a person-to-person transfer under section 24070. The person-to-person transfer in this case occurred in 2014 — after the amendment of section 23800(e) to allow the imposition of conditions on such a transfer.

Appellant cites a number of cases to support his position that the conditions are void, the majority of which were decided prior to section 23800(e) being amended to permit the imposition of conditions during a person-to-person transfer. The Appeals Board reversed several Department decisions in which conditions had been imposed during such transfers, because it was not yet allowed under 23800(e). (See e.g., *Hermosa Pier 20, LLC* (2013) AB-9284; *Hermani* (2013) AB-9285.) In those decisions, the appellants argued that since the Department lacked the power, prior to 2013, to impose conditions in connection with a person-to-person transfer, established law required that those conditions be stricken as void. The Board agreed, and based its decisions on several California Supreme Court cases which addressed an obligation on the part of the courts to declare void any attempts by administrative agencies to enlarge their statutory powers. In *American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-1036 [56 Cal.Rptr. 2d 109], the Court held that the Unemployment Insurance Appeals Board lacked the statutory authority to award prejudgment interest on benefit awards. In so doing, the Court cited its earlier decision in *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379 [241 Cal.Rptr. 67], that "specifically affirmed the rule that administrative regulations

purporting to enlarge the scope of administrative powers are void, and that courts are obligated to strike them down." (See also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689]: ["Administrative regulations that alter or amend the statute or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations"].)

In the instant case, by contrast, we do not have a situation where the Department is trying to enlarge its powers. Section 23800(e) clearly allows it to impose conditions where, as here, the police department has requested those conditions not be removed. The conditions imposed in 2014 and transferred in 2017 did not occur prior to section 23800(e) being amended to permit the imposition of conditions during a person-to-person transfer, and are therefore not void. Instead, we have a situation now where the SPD requested, on February 13, 2019, that the current Petition be denied. In the SPD's letter to the Department investigator it states:

The Sacramento Police Department denies the modification of conditions request by the licensee to remove conditions 2 and 7 based on the existing transient problem adjacent and surrounding area to the premise. Allowing single sales and distilled spirits smaller than 750 ml. will be detrimental to the area and will contribute to an existing homeless and transient problem. Also, modifying conditions will interfere with the safety, cleanliness, and quiet environment of the nearby residents.

(Exh. D-3.) This constitutes substantial evidence for denying the Petition, and clearly states the reasons why the conditions should remain.

Business and Professions Code section 23803 states, in pertinent part:

(a) The department, upon its own motion or upon the petition of a licensee or a transferee who has filed an application for the transfer of the license, **if it is satisfied that the grounds that caused the imposition of the conditions no longer exist**, shall order their removal or modification, . . .

(b) 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.

(Bus. & Prof. Code §23803(a) and (b).) Appellant contends this section is not applicable and that he is not required to show that circumstances have changed. Appellant contends that because the “whereas clauses” in the Petition for Conditional License fail to state the reasons for the conditions, it is unfair to require appellant to prove that the reasons for the conditions no longer exist. We disagree.

We agree with the ALJ that the imposition of conditions was supported by substantial evidence from the beginning (see Conclusions of Law, ¶ 7), and that the current circumstances surrounding the premises, namely a homeless and transient problem, resulting in high crime, dictate the continuation of the conditions on the license. This is true regardless of the many improvements made by appellant, commendable as those are. Appellant simply has not met his burden to establish by substantial evidence that the reasons for the conditions no longer exist.

Furthermore, appellant has not established that the reasons for imposing conditions are too vague to be enforced. Appellant could, theoretically, produce evidence to refute the SPD’s assertion that an existing homeless and transient problem exists — if such is the case. And, he may do so in the future if circumstances should change. At such time as appellant is able to produce substantial evidence that there is no longer an existing homeless and transient problem, he may petition for removal of the conditions imposed as a result of those problems. This is not to say appellant caused the homeless and transient problem, only that the current circumstances dictate that the removal of the conditions would tend to exacerbate this existing problem.

ORDER

The decision of the Department is affirmed and the request for remand is denied.²

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

²This 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.

APPENDIX

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

IN THE MATTER OF THE PETITION OF:

HARDIP SINGH
A AND M FOOD & LIQUOR
1838 AUBURN BLVD
SACRAMENTO, CA 95815

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

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

SACRAMENTO DISTRICT OFFICE

File: 21-588216

Reg: 19089467

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on May 29, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

RECEIVED

JUN 03 2020

Alcoholic Beverage Control
Office of Legal Services

Sacramento, California

Dated: June 3, 2020



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE PETITION OF:

Hardip Singh
DBA: A and M Food & Liquor
1838 Auburn Blvd.
Sacramento, California 95815

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

Under the Alcoholic Beverage Control Act

} File: 21-588216
}
} Registration: 19089467
}
} License Type: 21
}
} Page Count: 185
}
} Reporter:
} Ningay Sing-CSR# 13761
} Coleman Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Sacramento, California, on February 13, 2020.

Patrice Huber, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Hardip Singh was present and represented himself in this matter (Petitioner).

The Petitioner seeks to remove or modify certain 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. The Department denied the Petitioner's request, after which the Petitioner requested a hearing. (Exhibit D-1)

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 13, 2020.

FINDINGS OF FACT

1. The Department issued a type 21, off-sale general license to the Petitioner for the above-described location (the Licensed Premises) on February 9, 2018. The license was previously held by a different owner. The license held by the previous owner had conditions that were attached as a result of a protest that was filed by the Sacramento Police Department (SPD). These substantiated concerns led to conditions being imposed on the type 21 license issued to the previous owner of the Licensed Premises. (Exhibit D-1) During the person-to-person transfer application for licensure made by the Petitioner, the Department found that the conditions were still applicable and included those seven conditions in the Petition for Conditional License (PCL)

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

presented to the Petitioner. On December 18, 2017 the Petitioner executed the PCL accepting these seven conditions. (Exhibit D-2) These are the conditions that are currently applicable to the Licensed Premises and two of them are the subject of this petition. (Exhibits D-1 and D-2)

2. The PCL for the type 21 conditional license executed by the Petitioner noted that there was substantial evidence of an identifiable problem that existed, either with the Licensed Premises itself, or in the immediate vicinity, that impacted the appropriateness of issuing the sought license. The PCL noted that the Department may grant the transfer, if the transfer, with conditions, would mitigate the concerns of the local governing body. Evidence at the hearing established that there were four residents within 100 feet of the Licensed Premises and that the Licensed Premises' location was within a high crime area pursuant to section 23958.4(c). (Exhibits D-4 and D-5)

3. The type 21 license accepted by the Petitioner, when it signed the PCL on December 18, 2017, had seven conditions to address the concerns identified by SPD and observed during the Department's investigation of the application. The conditions were as follows:

1. Sales and service of alcoholic beverages shall be permitted only between the hours of 8:00 a.m. and 11:00 p.m. each day of the week.
2. No beer or malt beverage products shall be sold, regardless of container size, in quantities of less than six per sale.
3. Wine shall not be sold in bottles or containers smaller than 750 ml. and wine-coolers, beer coolers, or pre-mixed distilled spirit cocktails (if allowed by the license) must be sold in manufacturer pre-packaged multi-unit quantities.
4. No wine shall be sold with an alcohol content of greater than 15% by volume except for "Dinner Wines" which have been aged two years or more and maintained in corked bottles.
5. No pay phone will be maintained on the interior or exterior of the premises.
6. No alcoholic beverages shall be consumed on any property adjacent to the licensed premises under the control of the licensee(s).
7. No distilled spirits shall be sold in bottles or containers smaller than 750 ml. (Exhibit D-2)

4. The Licensed Premises operates as a convenience store exercising type 21 privileges in the Ben Ali neighborhood of Sacramento, California. (Exhibit A-3) The Petitioner accepted the above seven conditions on December 18, 2017 when the petition for conditional license was executed. The Petitioner is currently exercising privileges pursuant to this type 21 license with the conditions described. (Exhibit D-2 and D-4)

5. The Licensed Premises is located in a one-story, stand-alone building on Auburn Blvd., a two way thoroughfare that sits adjacent to railroad tracks. The structure containing the Licensed Premises is surrounded by a parking lot. (Exhibit A-19) Auburn Boulevard itself is lined by primarily industrial businesses. The Licensed Premises is located in a mixed use zone. The City of Sacramento plan for the area containing the Licensed Premises allows for commercial

businesses but there are also residences in the neighborhood directly east, including multiple residences within 100 feet of the Licensed Premises. (Exhibits A-19, D-4, D-6 and D-7)

6. Since taking over, the Petitioner has substantially improved the operation of the Licensed Premises. Improved lighting has been installed on the exterior. The interior has been cleaned. Improved shelving and a much larger variety of convenience goods are on offer. The Petitioner has improved the posted signage regarding alcohol purchases. The exterior is maintained and kept clean much more effectively than during the period of previous ownership. The Petitioner has kept the exterior and the surrounding parking lot free of debris. (Exhibits A-19 through A-23) The Petitioner has taken active steps to prevent loitering and open container incidents in the areas controlled by him. Multiple neighbors and SPD witnesses consistently testified that the Petitioner has been a responsible business owner. Multiple neighbors, neighborhood groups, and organizations submitted letters supporting the Petitioner and citing his operation of the Licensed Premises in a responsible manner as a positive for the neighborhood. (Exhibits A-8 through A-18)

7. On January 17, 2019 the Petitioner submitted, to the Department, a petition to modify the conditions of its type 21 license. The Petitioner sought to have conditions 2 and 7 removed from the license. These conditions state:

- No beer or malt beverage products shall be sold, regardless of container size, in quantities of less than six per sale.
- No distilled spirits shall be sold in bottles or containers smaller than 750 ml. (Exhibit D-2)

8. As a result of this petition, the Department communicated with SPD and investigated the appropriateness of the modifications sought. The Department determined the modifications sought should be denied. The Department specifically determined that the circumstances that led to these conditions still exist. The Department received evidence that a substantial transient and homeless population still existed in the immediate area surrounding the Licensed Premises and that these conditions were enacted to combat problems associated with portions of this population. (Exhibits D-3 and D-4)

9. The Department also notified the SPD of the request for condition modifications sought by the Petitioner. After receiving notice, the SPD expressed opposition to the modifications sought by the Petitioner in a letter that was sent to the Department's licensing representative on February 13, 2019. (Exhibit D-3) Multiple officers and representatives from the SPD testified in this matter in support of the SPD's opposition to the modification. These witnesses testified to a pervasive homeless and transient population that had established itself along the train tracks adjacent to the Licensed Premises and in a park approximately a quarter mile north of the Licensed Premises. SPD officers and civilian witnesses, with training and experience in interacting with this population, credibly testified to significant percentages of this population having alcohol and drug addiction issues.

10. The SPD presented substantial video evidence of the enormous breadth of the homeless and transient population problem in the area immediately surrounding the Licensed Premises. Representatives of the SPD flew over the area and filmed the existing homeless camps from a helicopter. In relation to the homeless encampments, the Licensed Premises appeared to be the closest, easily accessible, off-sale establishment selling alcoholic beverages. (Exhibit D-7) Multiple witnesses credibly testified to injuries and deaths suffered by homeless persons crossing the train tracks from the homeless camps in order to access locations on Auburn Boulevard, like the Licensed Premises. Multiple witnesses testified to concerns that removing the conditions would lead to an increase in unsafe trips across the train tracks, general loitering issues, public consumption of alcohol, and increased panhandling by transients trying to raise money for single unit purchases.

11. SPD and civilian witnesses repeatedly noted, in testimony and in writing, that there have been no substantive changes in the composition of the area surrounding the Licensed Premises and that the restrictions in the conditional license were appropriate and necessary to protect the surrounding neighborhood. The SPD conducted a written survey of the impacted residential community around the Licensed Premises regarding the sought modifications by the Petitioner. Multiple survey respondents expressed concerns about the homeless population and how the change could negatively impact their quality of life. The majority of surrounding neighbors opposed allowing the sought change. (Exhibits D-9 and A-1)

12. The Petitioner has not had any law enforcement problems at the Licensed Premises involving its licensure with the Department during the period it has held the type 21 license. The Petitioner's business is clearly a responsibly run establishment. There is no evidence that there have been calls for service or complaints lodged against the Licensed Premises with the SPD for contributing to the transient and homeless problems in the surrounding area. By all accounts, the Petitioner has been a responsible licensee. The repeated concerns regarded matters beyond the Petitioner's control, including the homeless and transient population and the large number of crimes in the neighborhood. (Exhibit A-4)

13. The Petitioner presented evidence in testimony that some nearby licensed establishments did not have the same restrictions preventing single unit sales and preventing distilled spirit sales of units smaller than 750 ml., even though their circumstances, to the Petitioner, appeared to be comparable to those of the Licensed Premises. The Petitioner presented evidence that his other Department licensed business is significantly more profitable because it does not operate with the same restrictions on single unit sales.

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. In cases involving an application for an original license or the premises-to-premises transfer of a retail license, rule 61.4² provides that no such license shall be issued if the premises or its parking lot is located within 100 feet of a residence. An exception to this prohibition exists if the applicant establishes that the operation of the business would not interfere with such residents' quiet enjoyment of their property.

3. 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."

4. Section 23803(a) provides 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."

5. Section 23803(b) provides that "[f]or 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."

6. In precedent decision *PAON Carlsbad LLC Dba 83 Degrees* (2018) 18-01-E, the Department director considered the issue of whether differing conditions in facially comparable licenses, alone, were a sufficient basis to justify a modification of conditions. In rejecting this conclusion, the Department director noted:

"The fact that the Department has recently issued licenses without the hours-restriction condition sought to be modified here, including two licenses issued during the pendency of this matter, is another such circumstance. That said, the fact that other nearby licenses were issued with different hours restrictions than the license here is, without more, not a justification to remove or modify the condition given that each application is evaluated independently."

This precedent decision established that this circumstance is but one of many factors to consider in determining whether the Petitioner has met its burden of proof. The precedent decision went on to note that:

"It is overly simplistic to assert that all licenses in the vicinity should have the same conditions. Without more, simply arguing that it is unfair to have different operating conditions does not satisfy the licensee's legal burden under section 23803. If that is all

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

that is required, licensees could pick and choose which conditions they want on their license based upon what other licensees close by have on theirs. This would fundamentally defeat the particularized assessment of the appropriateness of conditions on individual licenses without regard for all surrounding factors.”

7. At the time the type 21 Petition for Conditional License was presented to the Petitioner for issuance as a conditional license, the Department determined that there was substantial evidence from the SPD that identifiable problems existed that needed conditions to mitigate. The evidence was that there was a substantial transient and homeless problem in the area and that conditions were needed to address associated problems with this population. As a result of these “whereas” findings, seven conditions were imposed on the license sought. The Petitioner initially agreed with these determinations, and the conditions designed to mitigate their impact on the surrounding residences, when it signed the petition for conditional license on December 18, 2017. (Findings of Fact ¶¶ 1-13)

8. The conditions in question were directly designed to protect the people and neighborhood in the immediate area surrounding the Licensed Premises. The conditions, including the ones at issue in this petition, are all tailored to prevent the behavioral problems associated with the significant portion of the transient and homeless population that also suffers from alcohol and drug abuse issues. (Findings of Fact ¶¶ 1-13)

9. The burden is on the Petitioner is to establish changed circumstances such that the imposed conditions would no longer be necessary. By all appearances, the circumstances that led to the previously imposed conditions continue to exist today. The Licensed Premises is still within 100 feet of multiple residences and remains surrounded by a mixed-use community. That community is struggling with an enormous homeless population. The Licensed Premises still exercises type 21 privileges and persons from the homeless and transient population remain potential customers. This privilege to sell alcohol, if unregulated, has the potential to contribute to public welfare issues caused by the substantial homeless and transient population that has entrenched itself in the surrounding community. Many of these homeless and transient individuals have alcohol and drug abuse challenges. The conditions at issue are designed to combat alcohol abuse, loitering, and panhandling issues associated with single sale beers and portable distilled spirits sought out by this population. The Petitioner has not shown changed circumstances that would justify revisiting the conditions imposed by the Department. (Findings of Fact ¶¶ 1-13)

10. It is clear that the Licensed Premises is a well-run operation. The Petitioner has not contributed to the problems associated with the homeless and transient population. However, the mere fact that it is well run is insufficient to justify the modification of the operative conditional license. The legal standard for modifying conditions is whether the grounds which caused the imposition of conditions have changed. The conditions have not changed, and the restrictions continue to be necessary. Evidence that surrounding residents have not experienced problems created by the Licensed Premises suggests that the conditions restricting single unit sales have been a benefit. (Findings of Fact ¶¶ 1-13)

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11. It is the Petitioner's burden to establish that the underlying grounds have changed. The Petitioner has failed to do so in this case. (Findings of Fact ¶¶ 1-13)

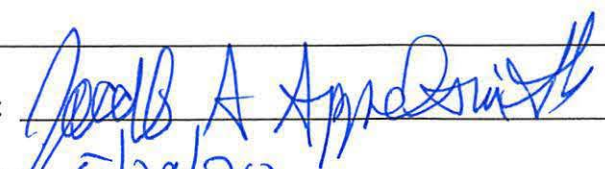
12. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

ORDER

The Petitioner's request to remove conditions two and seven from the Petition for Conditional License is hereby denied.

Dated: March 2, 2020


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>5/29/20</u>