ISSUED NOVEMBER 2, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MICHAEL HAWKINS, INC. dba AM-PM NEC of Highway 101 and Vineyard Drive Templeton, CA 93465, Appellant/Applicant, v. NANCY BUCKLEY, et al., Respondents/Protestants, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7249 File: 21-337753 Reg: 98042959 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA

Michael Hawkins, Inc., doing business as AM-PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which sustained the protests of Nancy Buckley, John Richardson, Wendy Richardson, Terry Smith, and the protest of Diana M. Larsen on behalf of the Templeton Unified School District, and denied his application for the transfer of an off-sale general license on the

[1]The decision of the Department, dated November 5, 1998, is set forth in the appendix.

ground transfer to the proposed premises in question would be contrary to public welfare and morals because it would interfere with the normal operation of Templeton Continuation School and Templeton High School.

Appearances on appeal include appellant Michael Hawkins, Inc., appearing through its counsel, Ralph Barat Saltsman and Steven Warren Solomon; protestants Nancy Buckley, John Richardson, Wendy Richardson and Terry Smith; protestant Diana M. Larsen on behalf of the Templeton Unified School District; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

This appeal comes to the Appeals Board after the Department denied appellant's application for transfer of an off-sale general license to a proposed 24-hour AM-PM mini-mart/gasoline station in Templeton, California, on the ground operation of the premises, even with proposed conditions, would interfere with the normal operation of Templeton Continuation School and Templeton High School.[2] The Department's decision followed an administrative hearing on August 26, 1998, at which oral and documentary evidence was presented.

Jon Lichty, an experienced Department investigator, testified that he was the person who investigated the application and recommended its denial. He identified

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[2] Other grounds for denial contained in the statement of issues as delineated by the administrative law judge included creation of a traffic hazard, creation of a public nuisance and creation of a law enforcement problem. These were found not to have been established. In addition, although other Templeton schools were included in the statement of issues as being among those whose operation would be interfered with, there were no findings made regarding any adverse consequences they might experience if the premises were to be licensed.

Templeton High School as the only consideration point that he considered,[3] but explained that Templeton has located most of its school facilities in the same overall area, on the same side of Highway 101 as the proposed premises, and on the other side of Vineyard Drive, a two-lane road. Other school facilities included the district offices, an adult school, a continuation high school, a day school, a middle school, and a home school. Although the high school, the building closest to the prospective location of the proposed premises is less than 600 feet from the site as the crow flies, there is no direct means of access,[4] and the actual walking or driving distance is somewhere between 1,600 feet [RT 41] and 2115 feet [RT 87], depending upon whose measurements are accepted.

Lichty ultimately recommended that the license transfer be denied because of his concern about the possibility that littering problems experienced by the school

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[3] A consideration point is, in Department terminology, a church, school, hospital, play ground or youth facility. By statute, these are singled out for special consideration when they are located within a specified proximity to a proposed premises. Business and Professions Code §23789 provides:

> "(a) The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail license for premises located within the immediate vicinity of churches and hospitals.
>
> "(b) The department is specifically authorized to refuse the issuance, other than renewal or ownership transfer, of any retail licenses for premises located within at least 600 feet of schools and public playgrounds or non-profit youth facilities, including, but not limited to, facilities serving girl scouts, boy scouts, or campfire girls. This distance shall be measured pursuant to rules of the department."

[4] The two properties are separated by a wooded area, a fence, a gully, and Vineyard Drive. As Lichty put it, "It's not what I would call access. I'm sure kids can be very creative if they want and figure it out, but it is not what would commonly be used as a thoroughfare for anybody" [RT 37].

would be increased, and that students might be attracted to the premises to the point where it became a place to loiter [RT 25], and a potential for alcohol-related student suspensions [RT 30]. Lichty also testified that he thought there might be even more interference with the high school once a proposed performing arts building was constructed, because it would be even closer to the proposed premises [RT 27]. He was not, however, concerned about the other issues raised by the protestants, that the location of the proposed premises might create a traffic hazard, law enforcement problem, or public nuisance [RT 28-29].

Dr. Curt DuBost, Superintendent of Schools for the Templeton Unified School District, selected as spokesperson for all the protestants, testified at the hearing. He based the school district's opposition to the application "almost entirely due to the proximity to the high school, the continuation school, and the community day school out of fear --based on prior experience at that site," referring to alcohol-related student offenses at Templeton High School [RT 46] and to the fact that many of the students at the continuation school have substance abuse related problems [RT 47-48]. After describing an incident where a student purchased and consumed vodka and vomited at a pep rally, he summarized his three principal concerns: students arranging for others to purchase alcohol for them; students using fake identification; and adults drinking at such school functions as football games [RT 47-48]. He felt that "readier access" to alcoholic beverages from the proposed premises could result in people drinking before their arrival at a school event, or leaving at half-time or some time during the event and returning after more drinking [RT 49]. Although DuBost spoke well of Michael Hawkins, he simply

felt the proposed premises were too close to the high school.

On cross-examination, DuBost listed three ways in which he thought students obtained alcoholic beverages: by stealing it from their parents' liquor cabinet or refrigerator; by getting an older friend, relative, or even parent to get it for them; or by using false identification [RT 51]. Asked about specific locations, he identified several licensed locations in or near Templeton. DuBost conceded that if a license were to issue, the school district would at least want the 14 conditions set forth in the petition for conditional license, and would probably want additional conditions.

DuBost summed up his testimony:

> "I guess I would just very quickly summarize that based on my experience again in other schools, this isn't just speculation. Kids love to do things like run off -- run across the street to get something to eat or drink during school hours, going --playing hooky during the day is something kids always have and always will be willing to do.
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> "To have an alcohol-related institution business right across the street -- based on the fact that alcohol is unfortunately the drug of choice, I guess, of Templeton youth, in all good conscience could not see my way clear to support this in any way."

Nancy Buckley, one of the protestants, and a mother of teenagers, testified that she had personally observed an adult purchase an alcoholic beverage and give it to minors. Although she agreed with DuBost's concern about the students having more convenient access to alcohol, she appeared to view the problem more as one involving the creation of a traffic hazard [RT 59].

Pasquale Mastantuono, owner of a winery across the freeway from the high school, and the father of two elementary-age children, testified that he had no

objection to the granting of the license. He saw the matter as one of property rights and parental responsibility [RT 63-64].

Lawrence Ramos, a vocational rehabilitation counselor and an assistant coach at Templeton High School, and parent of both former and future Templeton High students, testified that the high school has a closed campus, and that staff members are responsible for preventing students from leaving the campus. In his opinion, "the business being in that location is [not] going to have an impact on students, adults. Problems will occur whether that facility is there or not" [RT 68]. Like Mastantuono, Ramos viewed the matter as one of parental responsibility [RT 69].

Ramos described the fencing, trees and terrain that separated the high school from the proposed premises, which, in his opinion, precluded accessibility from the athletic practice field to the corner of the intersection where the premises would be located [RT 71-72, 74-75].

In response to questioning by DuBost, Ramos admitted being aware of problems involving spectators coming from the freeway ramp and going over the fence to avoid paying admission to an athletic event [RT 77]. He also confirmed an incident where a twelve-pack of beer was brought onto a bus occupied by members of the high school track team [RT 77-78].

Michael Hawkins testified in support of the application. Hawkins has held five different alcoholic beverage licenses over the past 13 years, and, during that time has been disciplined twice for sale to a minor decoy, in 1991 and 1992 [RT

81, 99]. He presently has two locations in Atascadero [RT 98-99].

Hawkins identified a series of aerial photos of the area showing the relationship between the location of the proposed premises and that of the Templeton High School and other school buildings. He testified that he measured the distance between the closest high school building and the proposed premises to be 645 feet. From the location of the proposed premises to the door of the high school, by way of the streets, the distance was approximately 2,115 feet, according to Hawkins. Referring to photos taken from ground level, and to his own inspection, Hawkins said the store would not be visible from the high school because of the trees. He said the terrain between the two properties was such that he fell while taking measurements, and at one point there was a vertical drop of about 20 feet [RT 100].

Hawkins testified that the premises will sell only wine and beer, despite the fact that the license to be transferred is a general license. He plans to replace the license after the transfer [RT 98].

Kenneth Wickerham, a site acquisition manager for Arco testified that his duties included approval of dealership sites as well as the purchase of sites for stations owned by Arco. Wickerham testified that as an AM-PM franchisee, Hawkins and a manager would be required to take a seven-week training course, consisting of three weeks in a classroom, and four weeks at an existing company operation [RT 113]. According to Wickerham, at least 10 percent of the program would be devoted to sales of alcoholic beverages [RT 114]. Thereafter, Hawkins'

employees would undergo similar training from their manager or from Hawkins.

Dr. DuBost was recalled as a witness and explained where the proposed performing arts center would be located. He acknowledged that construction had not begun, nor had a contractor been hired, but insisted that sufficient funding was in place for it to be built, commencing in April, 1999 [RT 129-130].

Following the conclusion of the hearing, the administrative law judge issued a proposed decision in which, after reviewing the underlying facts in considerable detail, he sustained the protests against the transfer. The Department adopted the proposed decision, and appellant thereafter filed a timely notice of appeal.

In its appeal, appellant contends that the Department based its decision on the mere proximity of the proposed premises to Templeton High School, and that by doing so, applied an erroneous legal standard.

DISCUSSION

Appellant contends the Department employed an erroneous legal standard when it denied the license "due to the mere proximity of a high school to the applicant's premises" (App.Br., page 1).

The Department defends its decision, contending it was based upon evidence which demonstrated that approval of the license would have an adverse impact upon the students and the schools. The Department cites, as among the proper criteria to be examined, and which it says were considered in this case, the age of the students, the proximity of the premises to the school, whether the school suffers from alcohol-related problems, and the type of proposed operation. The

Department contends that the proposed operation is nearby, is accessible, and is one which would attract high school teenagers from a school already known to be afflicted with alcohol-related problems.

This is not a "mere proximity" case as appellant would have the Board believe. The administrative law judge clearly did not believe so (Determination of Issues IV):

> "Approval of the applied-for license transfer to the proposed premises, even with the proposed conditions, would interfere with the normal operation of both the Templeton Continuation School and Templeton High School by reason of Factual Findings, paragraphs III, V through VII and XII through XIX.
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> "More than mere proximity resulted in this determination. Specifically noted is the fact there is no significant other commercial business in the immediate vicinity, the schools in question serve high school age children and the range of products offered at convenience stores such as is proposed includes foods and snacks suitable only for take-out, which increases the likelihood that alcoholic beverages sold will be consumed nearby along with the snacks and food."

It is also clear from the extensive factual findings that the administrative law judge carefully considered the evidence in the course of reaching the conclusion that the transfer should be denied. While much of that evidence was opinion testimony, that does not make it any the less supportive of the result. The opinions most in line with the result reached by the Department were those of an experienced Department investigator[5] and an experienced school administrator[6] well

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[5] Lichty has been employed as a Department investigator for 26 years [RT 11].

[6] DuBost has been superintendent of the school district for seven years, and a high school principal in the district for five years before that, and an assistant principal and dean of students in other school districts [RT 45].

familiar with the problems involving high school students and alcoholic beverages.

None of the cases upon which appellant relies held that the Department erred in refusing to issue a license where the proposed premises were located in the close proximity of a high school.

In Weiss v. State Board of Equalization (1953) 40 Cal.2d 772 [256 P.2d 1], the California Supreme Court sustained a Department refusal to issue an off-sale beer and wine license to a delicatessen located 80 feet from a high school. The fact that there were other outstanding licenses in the area was held not to require a different result.

In Martin v. Alcoholic Beverage Control Appeals Board (1961) 55 Cal.2d 867 [13 Cal.Rptr. 513], the California Supreme Court sustained an Appeals Board reversal of a Department decision which had denied the issuance of a retail on-sale beer and wine license for premises located across a street and 70 feet from a church. The Department argued that its denial of the license was an exercise of discretion under Business and Professions Code §23789, subdivision (a), immune from attack, and that the proximity of the premises to a church was in and of itself sufficient evidence to support its decision.

The Court concluded that §23789 did not exempt the Department from compliance with the constitutional mandate that a showing of "good cause" was required for refusal of a license:

> "The Legislative enactment ... obviously did not determine that the proximity of the premises to a church was in and of itself 'good cause' for refusal of

> the license. If mere proximity were as a matter of law 'good cause' for denial of a license, the department would not be specifically authorized to refuse the issuance; by contrast, it would be specifically required to refuse it. Therefore, by the terms of the statute and the constitution it is clear that in every such case the department is bound to exercise a legal discretion in passing on the application."

(Martin v. Alcoholic Beverage Control Appeals Board, supra, 13 Cal.Rptr. at 517) (emphasis in original).

It is noteworthy that, in its discussion of the factual background of the case, the Martin court placed emphasis on the fact that the church had not filed a protest, and the record contained no testimony from any official or member of the congregation of the church. In the course of its discussion of the limitations upon the discretion vested in the Department, the Court cited and distinguished Weiss v. State Board of Equalization, supra, in which it had affirmed the Board of Equalization's denial of a license where the premises were within 80 feet of some of the buildings of a public high school:

> "Whether the school authorities had objected to the application for the license is not stated in the opinion but it may be noted that the school was a public high school and that some of its buildings were used for R.O.T.C. Here, the church is, of course, a private organization which could have but did not object to respondent's application."

In Reimel v. Alcoholic Beverage Control Appeals Board (1967) 255 Cal.App.2d 40 [62 Cal.Rptr. 778, 784], the court affirmed an Appeals Board reversal of a Department decision refusing to issue a license where the premises were across the street from an elementary school. In doing so, the court distinguished Weiss v. State Board of Equalization, supra, on several grounds, one of which was that in Weiss, the putative premises were located near a high school:

> "Finally, and in vital contrast to Roosevelt Elementary School, the nearby school in the Weiss case was a high school. Within the range of administrative discretion, the prospective problems involved with a beer and wine license 80 feet from a high school building are conceivably more detrimental to public welfare and morals than with a 115-foot -- or 400-foot -- distance between a license and a school where no child is more than 12 ½ years old."

Protest of Christine M. Alexander (1992) AB-6098, and Protest of Connie Boskind (1992) AB-6100, involved appeals by protestants against the issuance of licenses to a supermarket chain and a drug store chain, both located in a new shopping center in close proximity to a proposed elementary school. Among the grounds of protest were a contention that a law enforcement problem would be created, and the school children would be at risk from inebriates attracted to the school playground who might find the premises convenient for purchasing alcoholic beverages. The Department concluded that there would be no law enforcement problem, based upon the experience of the Colton Police Department with another licensed location near an elementary school, and the Board found this to be sufficient evidence to support the decision denying the protests.

The Appeals Board decision in Protest of Kuester and Vartan (1992) AB-6108 is also not helpful to appellant. Appellant quotes (App.Br., page 12) only from that portion of the decision which minimized concerns about sales to minors in light of the existence of laws relating to such sales, and the applicant's (Texaco) vigorous program to prevent such sales, and concluded that protestants had failed to show that issuance of the license would interfere with the operation of an elementary school located near the premises. Appellant ignores the Board's

greater concern about the fact that high school students might congregate around the premises (a convenience store):

> "The problem of high school students -- who use public bus transportation -- being compelled to wait a half hour before transferring at the intersection to another bus, was stated in the protests ... . The mixture of high-school-age students and an off-sale beer and wine store poses a substantial problem in comparison to mixing elementary-age children and such a store. A condition delaying the opening hour for alcoholic beverage sales until after the student layovers are ordinarily completed each school day would seem reasonable."

The high school in question was located one-half mile from the premises.

In Kirby v. Alcoholic Beverage Control Appeals Board (1968) 261 Cal.App.2d 191 [67 Cal.Rptr. 628], the premises, a proposed self-service drive-in grocery and delicatessen, were located 360 feet from a K-8 elementary school. The Department denied the application, the Appeals Board reversed the Department, and the Court of Appeal, in turn, reversed the Appeals Board. The Court of Appeal discussed a number of considerations it felt supported the Department's decision: the school's large enrollment; the fact that some of the students were as old as 14 years of age; the surrounding area was primarily residential; the number of students who passed by and/or patronized the premises; the proximity of the premises to the school; and the fact students would be able to see the premises, and the exterior advertising of alcoholic beverages, from the school.

There is language in Kirby (67 Cal.Rptr. at 635) that is pertinent:

> "In addition to the proximity of the proposed premises to the school, evidence on the record before us presents a situation where at least there could be a reasonable difference of opinion as to whether the issuance of the license would be inimicable to public welfare and morals. 'Since the power to determine the facts in licensing matters is vested in the Department and not in the Board, or the courts, a review of the action of the Department is

governed by the familiar rule that where there is room for a reasonable difference of opinion with respect to the correctness of a finding of fact, it will not be disturbed by the reviewing tribunal.'"

The sense one gets from the cases - and there are too many to mention here - is that the results are inconsistent, but the courts and the Appeals Board see a greater concern if the school proximately located near a proposed premises is a **high school** rather than an **elementary** school This is understandable, since it is during the high school years when access to and experimentation with alcohol is, to many students, a rite of passage.

Michael Hawkins is undoubtedly the fine person the evidence shows him to be, but we cannot say the Department is wrong in believing that to permit the transfer would be contrary to public welfare and morals. The risk his store would be a target for high school students in search of alcoholic beverages, through their possible use of false identification or the services of cooperative adults, simply cannot be ignored.

ORDER

The decision of the Department is affirmed.[7]

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

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[7] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.