ISSUED JULY 29, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BARBARA D. KELLY et al. Appellants/Protestants, v. IL FORNAIO AMERICA CORPORATION dba Il Fornaio 1333 First Street Coronado, CA 92118, Respondent/Applicant, and DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7350 File: 47-340761 Reg: 98044362 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: July 1, 1999 Los Angeles, CA

Barbara D. Kelly, Carolyn A. Kephart, Michael D. Kephart, Patricia M. Kieffer, Robert W. Kieffer, Daniel K. Pope, IV, Evelyn R. Pope, Barbara O. Roswell, Ervin B. Rubey, Mary R. Rubey, Galen Schelb, Geraldine H. Shaw, A. Swagemakers, Margaret V. Swagemakers, Annabelle A. Talmadge, Charles J. Talmadge, Betty J. White, Charles E. White, Barbara Wood, and Betty Yerger (protestants), appeal

from a decision of the Department of Alcoholic Beverage Control[1] which overruled their protests against a person to person/premises to premises transfer of an on-sale general bona fide public eating place license to Il Fornaio America Corporation (applicant).

Appearances on appeal include appellants who are the protestants listed herein, appearing through their representatives, Charles E. White and Jerry Cardinale; applicant Il Fornaio America Corporation, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Applicant on March 17, 1998, filed an application for a person to person/premises to premises transfer of an on-sale general bona fide eating place license, for placement on a site abutting the San Diego Bay on the Coronado side.

On May 26, 1998, and during the Department's investigation of the transfer, applicant consented to the imposition of 17 conditions on the license if the license were to be issued. The stated reasons for the imposition of the conditions were that there are residents within 100 feet of the parking lot and an undue concentration of licenses in the area. The conditions imposed limited operations as follows: (1) (Sale of Alcoholic Beverages) closing at midnight on weekdays and 1:00 a.m. on weekends, closure of the patio one hour before the main premises

[1]The decision of the Department dated February 11, 1999, entered following the Department's order allowing for reconsideration, and the decision of the Department dated December 11, 1998, are set forth in the appendix.

closing, and no reduced-price promotions; (2) (Interior Considerations) quarterly gross sales of alcoholic beverages to be no more than 40% of the food sales, off-sale privileges reduced, no video games or pool type tables, live entertainment provided limited to two strolling musicians with no wind or brass instruments,[2] no dancing, and rear door access controlled; (3) (Exterior Considerations) adequate parking lot lighting, no loitering, control of litter and trash disposal, and interior and exterior restaurant noise not to be audible beyond areas under the control of applicant.

Notwithstanding, the Department denied the application on August 6, 1998. An administrative hearing was held on November 3, 1998. Subsequent to the hearing, the Department issued its decision (first decision) on December 11, 1998, which determined that the transfer should not be granted, and that the protests in opposition to the transfer were sustained. The Department listed the grounds as close proximity of residents, undue concentration of licenses, and traffic problems.

On December 21, 1998, applicant filed a request for reconsideration of the first decision, which was granted on December 24, 1998. Thereafter, the Department issued its decision on February 11, 1999 (final decision), reversing its position in the first decision, and granting the petition for transfer of the license, under certain conditions. The protests filed in opposition to the granting of the application were overruled.

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[2]The final decision eliminated all live entertainment.

Protestants thereafter filed a timely notice of appeal. In their appeal, protestants raise the following issues: (1) the Department's final decision after reconsideration is an abuse of the Department's discretion in that the final decision is arbitrary, and its reversal of the Department's first decision is based upon no new facts or evidence; (2) there is an undue concentration of licenses; (3) there are parking, trash collection, and noxious odor problems; and (4) the Department's Rule 61.4 prohibits the granting of the license, as applicant failed to prove that its operation would not interfere with the residents' quiet enjoyment.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion to deny the issuance of an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting of such license would be contrary to public welfare or morals.

The court in Koss v. Department of Alcoholic Beverage Control (1963) 215 Cal.App.2d 489 [30 Cal.Rptr. 219, 222], enumerated several considerations the Department may consider in determining if a license would endanger welfare or morals: "the integrity of the applicant as shown by his previous business experience; the kind of business to be conducted on the licensed premises; the probable manner in which it will be conducted; the type of guests who will be its patrons and the probability that their consumption of alcoholic beverages will be moderate; the nature of the protests ...."

The scope of the Appeals Board's review is different. That scope is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

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[3]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

I

Protestants contend the Department's final decision after granting reconsideration is an abuse of the Department's discretion in that the final decision is arbitrary, and the Department's reversal of its first decision is based upon no new facts or evidence.

The administrative hearing on November 3, 1998, produced 223 pages of testimony, commencing with the Department's investigator who testified as to the reasons that the Department had denied the application [RT 17-51, 115-155]. While there was testimony concerning census tract information as the foundation for determination that the premises was in an undue concentration area, no proper evidence was submitted to substantiate the investigator's hearsay testimony [RT 25]. The investigator testified that she picked the most viable conditions to be imposed on the license if it were to issue, that she felt would protect the protestants and other nearby residents [RT 137, 140-141]. Protestants and nearby residents live in two-story units extremely near the parking lot which separates the residents from the restaurant site [RT 43].

Kevin Ham, Director of Economic Development for the City of Coronado, testified that the city approved of the premises, and that such premises would be important to tourism [RT 54-64]. Earnest Harrison, the then Assistant Chief of

Police for Coronado, testified that he felt the conditions addressed the major questions of the police department, except he personally was concerned about the lateness of the hour (early morning hours) for sales and service of alcoholic beverages [RT 65-78]. Reint Reinders, CEO for the San Diego Convention Center, testified that the premises is a "critical part" of the tourism industry [RT 78-84]. Paul Speer, Commissioner of the San Diego Port District, testified that the Port owns the land, and leases the same to the port of Coronado [RT 85-91].

The testimony by the city and others, in the main, is irrelevant in its scope, for economic benefit to the city, or others, is not a basis for the granting of a license. But such testimony would have some value as to the question of public convenience and necessity, in theory, but such issue is irrelevant as there was no substantial evidence of an undue concentration of licenses.

Charles White, a protestant and spokesman for the nearby residents, testified that employee parking was his major concern.[4] Another nearby restaurant and the Ferry Landing complex, with sundry shops, also share the parking lot [RT 170, 176-177]. He felt that he and the other local residents did not want the restaurant, with or without alcoholic beverage privileges [RT 174] -- [RT 169-180].

James MacKenzie, vice-president for construction for applicant, testified that applicant would install a city-required filter bank system which would eliminate 60% of kitchen odors, but would also install a Molatron system which with the filter bank system would eliminate 95% of the odors, at considerable additional

[4]This concern is addressed in the final decision's condition 18.

expense [RT 188, 194-195] -- [RT 188-201]. Laurence Mindel, Chairman of the Board and founder of applicant, testified that the late hours were for the convenience of late evening diners [RT 216] - [RT 202-219].

Following the taking of such testimony, the Department's first decision was issued denying the license. Then followed the filing of applicant's Petition For Reconsideration, which apparently was a partial basis for the Department reversing itself from its original position of denying the license.

The Petition For Reconsideration adds relatively little to the evidence produced in the original administrative hearing. A comparison of the first decision and final decision shows little appreciable change in most of the findings and determinations.

The only major differences are found in Determination of Issues IV, VI, VII, and VIII:

a. Determination IV corrected the failure of evidence found in the first decision, that there was an undue concentration of licenses. Determination of Issues V claims that public convenience and necessity were shown by applicant, a point irrelevant in these proceedings, considering Determination of Issues IV;

b. Determination of Issues VI concerning traffic problems uses a criterion that is not valid in fact or law, stating that the parking problem would be no greater than that which would be "created by any commercial development," and thus is wholly unsupported by the findings or the record; and

c. Determination of Issues VII addresses the major concern to most of the parties, and that is potential interference with nearby residents. The determination validly concludes that the conditions imposed "... [While it] mitigates most of the potential residential interference with nearby residences, it does not fully establish noninterference as required by Rule 61.4 in order for the license to issue." Determination of Issues VIII states that: "A properly conditioned license would not interfere with the quiet enjoyment of nearby residential property ..." and then states: "The critical issue to establish noninterference will be the use and control of the parking lot in the evening hours. "

The modifications, omitting consideration of condition 18 from the present discussion, appear to be reasonably related to the reduction of potential noise which could disturb residential quiet enjoyment.

The Department has in simple form, corrected the errors of the first decision and attempted, possibly ineptly, to resolve the parking noise problem.

The issue then is whether the discretion of the Department allows this reversal from its original position. We determine that the Department has the discretionary power to change its position previously taken, and exercised that discretion properly. Discretion is properly exercised if there is a reasonable choice between several alternatives. The Department acted to deny the license, and apparently after a review of the record found the "undue concentration" error, modified the hours of sale of alcoholic beverages within the premises and on the

patio area, eliminated live entertainment, and eliminated music in the patio area. Additionally, the final decision seeks to control employee parking and control of noise in the parking lot.

II

Protestants contend there is an undue concentration of licenses.

Finding IV of the Department's decision found that there was no competent evidence that there was an undue concentration of licenses as determined by Business and Professions Code §23958.4. There is substantial evidence supporting this finding.

The only testimony provided at the administrative hearing on this issue was oral testimony of the Department's investigator as to undue concentration of licenses [RT 23-26]. That testimony was interrupted for a substantial period on the day of the hearing, for the taking of other witnesses' testimony [RT 52-53]. Thereafter, the investigator continued her testimony but made no mention of the necessary statistical documents. Without such documentation, the finding of the ALJ in the first decision that there was an undue concentration of licenses, was erroneous.

III

Protestants contend there is a parking, trash, and noxious odor problem. The conditions appear to reasonably address these concerns: condition 18 provides for employee parking away from the areas which are in close proximity to nearby residents, conditions 12 and 14 reasonably address the litter and trash containment

problems, and noxious odors appear to be reasonably mitigated in accordance with the testimony of Mr. MacKenzie concerning the installation of equipment that would eliminate about 95% of the odors coming from the kitchen area [RT 194-195].

IV

Protestants contend the Department's Rule 61.4[5] prohibits the granting of the license because there are residents within 100 feet of the premises or its parking lot, and applicant failed to prove that its operation would not interfere with the residents' quiet enjoyment.

Determination of Issues VII addresses this major concern of potential interference with nearby residents due to late night patrons arriving, but mainly leaving the premises by way of the parking lot. The determination validly concludes that the conditions imposed "... mitigates most of the potential residential interference with nearby residences, it does not fully establish noninterference as required by Rule 61.4 in order for the license to issue." Determination of Issues VIII states that: "A properly conditioned license would not interfere with the quiet enjoyment of nearby residential property ..." and then states: "The critical issue to establish noninterference will be the use and control of the parking lot in the evening hours." Apparently, Determination VIII is meant to be resolved by that portion of condition 18 concerning the security guard mandated in the Order that then follows.

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[5]California Code of Regulations, title 4, §61.4.

The United States Supreme Court has declared its concern for the tranquility of residential areas and the need to be free from disturbances. (Carey v. Brown (1980) 447 U.S. 455, 470-471 [100 S.Ct. 2286, 2295-2296, 65 L.Ed.2d 263].) Other "locational" cases involving protection of residential neighborhoods include Young v. American Mini Theaters, Inc. (1976) 427 U.S. 50 [96 S.Ct. 2440, 49 L.Ed.2d 310], and Matthews v. Stanislaus County Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914].

In the "residential quiet enjoyment"/"law enforcement problem" case of Kirby v. Alcoholic Beverage Control Appeals Board & Schaeffer (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857], the Supreme Court said "...the department's role in evaluating an application...is to assure that public welfare and morals are preserved from probable impairment in the future...[and] in appraising the likelihood of future harm...the department must be guided to a large extent by past experience and the opinions of experts." The case was not a Rule 61.4 matter (the closest residence was about 150 feet away).

The Alcoholic Beverage Control Act sets forth the proposition that the Department may make and prescribe reasonable rules as are necessary to carry out the purposes of the Act. (Bus. & Prof. Code §25750.) One of the rules promulgated by the Department is Rule 61.4, which reads in pertinent part:

> "No original issuance of a retail license ... shall be approved for premises at which ... the following condition[] exist[s]: ...(a) The premises are located within 100 feet of a residence ...."

Quiet enjoyment of their property by the citizenry appears to command the focused attention of the state. The rule above quoted mandates that no license is to be issued where a residence is located within 100 feet of the proposed licensed premises (or parking lot).

The Board over the years has visited the extremely restrictive requirements of Rule 61.4. The Board in Davidson v. Night Town, Inc. (1992) AB-6154, stated: "In rule 61.4, the department prohibits itself, as it were, from issuing a retail license if a residence is within 100 feet of a proposed premises ...."

The Board in Ahn v. Notricia (1993) AB-6281, stated: "This rule [Rule 61.4] concerns prospective interference or noninterference with nearby residents' quiet enjoyment of their property ... Apparently rule 61.4 is based on an implied presumption that a retail alcoholic operation in close proximity to a residence will more likely than not disturb residential quiet enjoyment."

In the case of Graham (1998) AB-6936, the Board cited many cases concerning quiet enjoyment and its supreme importance to the extent "that rule 61.4 is nearly absolute."[6]

In the case of Candeli v. Kong (1999) AB-7084, the Appeals Board reversed the decision of the Department where the licensed operation was within four feet of a protestant's home. The issue, like the present issue, concerned whether the

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[6]Citing Kassab (1997) AB-6688; Hyun v. Vanco Trading, Inc. (1997) AB-6620; Hennessey's Tavern, Inc. (1997) AB-6605; Lopez & Moss (1996) AB-6578; Alsoul (1996) AB-6543, a matter where the Appeals Board raised the rule on its own motion; J.D.B., Inc. (1996) AB-6512; Park (1995) AB-6495; Esparza (1995) AB-6483; and Saing Investments, Inc. (1995) AB-6461.

conditions imposed were sufficient to show that the licensed operation would not interfere with residential enjoyment. The Appeals Board found there was no substantial evidence to show non-interference, notwithstanding the conditions imposed. The Appeals Board's decision stated: "The conditions proposed appear more to be only a veneer covering a problem very inadequately addressed by the Department and its decision."

Notwithstanding the restrictive wording of the rule, the rule sets forth a procedure whereby the Department may issue a license even though the rule is applicable: "Notwithstanding the provisions of this rule, the department may issue an original retail license ... where the applicant establishes[7] that the operation of the business would not interfere with the quiet enjoyment of [their] property by residents."

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 (a), is that "...if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions..." the department may grant the license subject to those conditions. Section 23801 states that the conditions "...may cover any matter...which will protect the public welfare and morals...."

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[7]Webster's Third New International Dictionary, 1986, page 778, defines the word "establish," in the archaic form, as "to prove or make acceptable beyond a reasonable doubt," apparently meaning to prove.

We therefore view the word "reasonable" 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,"[8] in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem.

The Department concludes in its final decision that: "The critical issue to establish noninterference will be the use and control of the parking lot in the evening hours." Determination VIII is meant to be resolved by the Order that then follows: "[Applicant] shall provide and have present at least one designated security guard to patrol the parking area adjacent to the premises. The guard shall be on duty at least on[e]-half hour before sunset through one-half hour after closing each evening petitioner is open for business ...." It therefore appears that the Department fully was aware that any absence of effective control of the parking lot would be a potential affront to its own Rule 61.4. The Department in its own decision used the very applicable word "critical" to define the potential for harm.

The Department is charged with the duty under Kirby, supra, to evaluate an application so that future conduct does not impair public welfare and morals (in this case reasonable residential quiet enjoyment). While nearby residents cannot expect total noise elimination from the parking lot, the parking and exiting of vehicles from the premises must be reasonably controlled. Under Rule 61.4, residents should be

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

able to expect reasonable solutions to a situation that could cause extreme discomfort to those residents.

In the case of Becaria v. Argentine Association of Los Angeles, Inc. (1992) AB-6238, Rule 61.4 was applicable. The Department rejected a proposed decision by an administrative law judge who ordered the license issued subject to certain conditions, such as, applicant would provide valet parking to protect on-street parking for others. The Department determined that licensing the proposed premises would create a public nuisance due to the likelihood that an overflow of vehicles would likely result in parking along residential streets. The Appeals Board in the Becaria case, stated: "... the problem of parking and congestion apparently was regarded by applicant as a problem to be addressed by the city in its zoning regulations. Forgotten by applicant is the [D]epartment's responsibility to see that the licensed premises' operations does not adversely affect the nearby residents." The Board also said: "Adequacy of patron parking, and the attendant problems of people leaving a licensed premises at hours which could disturb the quiet enjoyment of nearby residents are legitimate concerns of the [D]epartment in protecting the public welfare and morals."

The case of A1RT8, Inc. (1998) AB-6914, also concerned the Department's Rule 61.4, where the issue was the change of a condition from a midnight cessation of sales and service of alcoholic beverages to a 2:00 a.m. cessation. The premises was in a subterranean level of a multi-level shopping center where residents would not be disturbed by the premises' operation. However, the parking

area was adjacent to a residential area but separated by a six-foot wall. The ongoing problems experienced were autos driving by the wall and the noise created by patrons walking to their cars parked adjacent to the wall. Car speeding while passing the wall, car radios playing, and conversation noise was experienced by residents near or after the current midnight closing. The Administrative Law Judge concluded:

> "It would appear however, that if the permitted hours of sale for alcoholic beverages were extended, this extension would probably result in increased vehicular traffic and probably increased vehicular parking adjacent to the residential area during the early morning hours."

In the current case now under review, the solution offered by the Department to the problem of late night and early morning car and people noise of patrons leaving the premises, say from 10:00 p.m. to 1:00 a.m., and later, and in a state of "feeling good," was to provide one security guard to patrol the parking area adjacent to the premises. There are no findings to support the proposition that the one security guard could possibly be a solution to the "critical" problem of late night and early morning parking lot noise. There is no substantial evidence that would support this necessary but "absent" finding. The imposition of one guard is a neglible resolution, a "token" solution to a very difficult problem. Such solution is wholly inadequate and contrary to the intent and meaning under the Department's own Rule 61.4.

It appears to the Board that the problem is made "critical" as the Department observed, by the very late night and early morning closing, which will cascade

clientele into the large parking area in the immediate vicinity of the sleeping residents, who in regards to the Department's Rule 61.4, have a greater expectation of protection from unreasonable noise, than does applicant to its hoped-for commercial enterprise.

The Department with its long tenured and broad experience, should be able to craft realistic and reasonable conditions which would tend to guarantee reasonable expectation of quiet enjoyment, and a realistic program within the capability of applicant. Past experience has shown various Department-crafted solutions, such as (1) exclusive valet parking commencing at the later hours, (2) more than "at least one" attendant to patrol and courteously assist patrons as they leave in the early morning hours, or (3) controlled area parking during the more critical early morning hours. The possibilities are many and varied, such as some sort of sound barrier, possibly trees along the wall cut sufficiently low to absorb sounds and yet not block such view as the protestants yet have. This is the area of discretion and expertise that demands the Department's properly exercised discretion between the alternatives to be explored and implemented.

We make the above observation as applicant has provided approximately 255 parking spaces for its patrons. The record (Exhibit I) shows that the premises is located relatively south of another restaurant entitled Peohe's. That restaurant

appears not to be a problem concerning parking, as its parking is some distance from the specific area for applicant's parking.[9]

ORDER

The decision of the Department is not reasonably related to a resolution of the problem for which the first two sentences of condition 18 were designed to resolve, contrary to §23800.

The decision of the Department is affirmed in all particulars, except as to that part of the order granting the issuance of the license and imposition of the first two sentences of condition 18 of the order which are reversed, along with Determination of Issues VI which is also reversed, and the matter is remanded to the Department for such further proceedings as may be deemed appropriate by the Department to properly and reasonably condition the license within the scope and intent of Determination of Issues VIII, in accordance with the views expressed herein.[10]

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[9]While not at issue, Exhibit I also shows a potential restaurant site, south of applicant's premises. According to the exhibit, this site would apparently use or share some of the same parking area with applicant. Comments at the Appeals Board hearing made reference to a Department investigation of this new restaurant. If this be the case, the Department may wish to consider the impact of the second restaurant in this present parking problem, in its duty to protect quiet enjoyment from future, but presently foreseeable harm.

[10]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.

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