

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

AB-9919

File: 21/41/86-615465; Reg: 20090506

DIANE E. SHEFFIELD
Appellant/Protestant

v.

RALEYS,
dba Raleys #415
4690 Freeport Boulevard
Sacramento, CA 95822,
Respondent/Applicant
and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Hubel

Appeals Board Hearing: October 15, 2021
Telephonic

ISSUED OCTOBER 19, 2021

Appearances: *Appellant:* Diane E. Sheffield, *in propria persona*,

Respondent/Applicant: Melani Johns, of Strike Kerr & Johns,
Beverage Law Group LLP, as counsel for Raleys, dba Raleys
#415,

Respondent: Lisa Wong, as counsel for the Department of Alcoholic
Beverage Control.

OPINION

Diane E. Sheffield (appellant) appeals from a decision of the Department of
Alcoholic Beverage Control¹ overruling her objection and issuing off-sale general and

¹ The decision of the Department, dated June 1, 2021, is set forth in the appendix.

instructional tasting licenses to Raleys, doing business as Raleys #415 (respondent), subject to the conditions set forth in the Petition for Conditional License.

FACTS AND PROCEDURAL HISTORY

Respondent applied for issuance of an on-sale beer and wine eating place license, along with a premise-to-premise transfer of an off-sale general license and an instructional tasting license for its premises located at 4690 Freeport Boulevard in Sacramento, California (the premises) in the Park Shopping Center. Prior to operating at this location, respondent operated another store approximately 500 feet across the street. Respondent's former location held both an off-sale general license and an instructional tasting license. The Department investigated respondent with respect to the applied-for licenses, and Department Licensing Representative, Akriti Arora (Arora), prepared a report based on her investigation. (Exh. D2.)

The premises was issued an Interim Operating Permit (IOP) on April 10, 2020 and opened for business on April 15, 2020. Respondent operated at its former location since July of 1964 with no disciplinary history. The premises complies with local zoning requirements and a conditional use permit was not required. There are no churches or hospitals within the immediate vicinity of the premises. There are no schools, public playgrounds, or nonprofit youth facilities within 600 feet of the premises.

There are 20 residences located within 100 feet of the premises, with the closest residences approximately 70 feet west, which are located at the rear, with separation factors of an alley, cypress trees, and a nine-foot-high block wall. The separation factors for the other residences are a nine-foot block wall, an alley, and cypress trees approximately 20 feet apart, which are anticipated to grow and provide an additional

sound barrier. The remaining residences are located either northeast, north, northwest, west, and southwest of the premises. The Department notified the 20 residences of the applied-for licenses but did not receive any response or protest therefrom.

The Sacramento Police Department (SPD) has jurisdiction over the area where the premises is located. The Department requested calls for service by SPD within 1,000 feet of the premises from April 2019 to April 2020, which SPD provided. The Department reviewed the calls for service and determined there were no unusual crime patterns, nor calls for service at the premises for vagrancy or loitering. Arora determined there was no evidence of high crime in the area.

On April 6, 2020, the Department received a conditional protest letter from SPD, that stated if respondent agreed to three conditions, SPD would withdraw its protest. Arora added two additional conditions for a total of five conditions to be imposed upon the licenses, should they issue. These include conditions that:

(1) sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 6:00 a.m. and 11:00 p.m. each day of the week; (2) the petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control as depicted on the most recently certified [in the petition]; (3) the parking lot of the Premises shall be equipped with lighting of sufficient power to illuminate and make easily discernible the appearance and conduct of persons on or about the parking lot. Additionally, the position of such lighting shall not disturb the normal privacy and use of any neighboring residences; (4) petitioner(s) shall actively monitor the area under their control in an effort to prevent the loitering of persons on any property adjacent to the licensed premises, as depicted on the most recently certified [petition]; and (5) signs shall be posted at all exists leading into the designated off-sale premises from the designated on-sale premises stating, "NO OPEN CONTAINERS OF ALCOHOLIC BEVERAGES BEYOND THIS POINT." Said signs shall measure no less than seven inches by eleven inches (7"x11") and contain lettering no less than one inch in height.

(Exh. D12.) Respondent signed and agreed to the requested operating conditions to allay any concerns of the Department and SPD.

On April 8, 2020, respondent submitted a letter to the Department describing how the premises' operation would not interfere with nearby residences' quiet enjoyment of the property. It explained that the sale of alcohol will be ancillary to its use as an essential service community grocery store. Respondent estimated approximately 18 feet of shelf space, and one 12-foot-wide cooler will be devoted to the display of beer, wine, and distilled spirits. The sale of alcoholic beverages will amount to less than 11 percent of total sales at the premises. The premises will also sell craft, domestic, and international beers, with wine offered at various price points and predominantly consisting of well-known brands which appeal to light or moderate social drinkers. The premises will not sell mini bottles of distilled spirits and its inventory will not appeal to panhandlers, vagrants, or criminal elements.

Respondent also anticipated minimal, if any, changes regarding the existing number of customers, truck deliveries, amount of traffic, or noise emanating from the premises. Respondent has taken preventative measures to ensure beer, wine, and distilled spirits are sold in a responsible manner. The premises has closed-circuit security cameras monitoring the alcohol sales area and a public view monitor, which serves to discourage loitering. The beer, wine, and distilled spirits will not be located near any exit to discourage theft. Finally, respondent noted that the parking lot is well illuminated.

Arora made two visits to the premises, on March 10, 2020 and April 10, 2020, but did not observe any noise, loitering, vagrancy, or litter. She observed very little traffic on Freeport Boulevard and no traffic on Wentworth Avenue. She saw ten cars parked in the

parking lot near the premises and determined there to be ample parking for the premises' customers and employees. There was also sufficient lighting in the parking lot which she determined would not disturb the nearby residents. Agent Guillen also visited the premises on April 7, 2020, and conducted an inspection. Agent Guillen did not observe loitering or vagrancy. The Department has not received any complaints about litter or loitering around the premises.

On March 18, 2020, respondent submitted a letter of public convenience or necessity (PCN) for its on-sale beer and wine eating place license. The restaurant is located within the premises for customers who prefer to enjoy a sit-down meal, with offerings of full meals, side dishes, and appetizers. The menu includes quick gourmet-style sandwiches, grilled paninis, and side dishes. Respondent requested an on-sale beer and wine eating place license to appease customer requests and expectations of an assortment of quality craft beers and local as well as international wines to compliment customer meals. The sale of beer and wine will account for a small portion of the restaurant's overall sales.

Respondent believes that adding a small, but well-curated selection of quality alcoholic beverages will add to the overall customer experience. Respondent will train employees in accordance with responsible alcoholic beverage service policies. Respondent believes that with the nature of its clientele, there will be no additional burden placed on local law enforcement by issuance of said license.

Based on the Department's investigation, respondent's planned operation, its agreement to operating conditions, and self-imposed restrictions, along with SPD's withdrawal of its protest and the Department's determination that public convenience or

necessity would be met by issuance of the license, the Department recommended the licenses issue subject to the foregoing conditions.

At the administrative hearing held on February 23, 2021, appellant appeared and testified that she has lived at her residence since May 2019. Appellant's residence is approximately 437 feet south of the premises. Appellant stated she is concerned with the potential increase of truck deliveries, noise, and possibility that the homeless would remain in the neighborhood. Appellant took photographs in the neighborhood, which included a homeless person pushing a tarp-covered shopping cart southbound on Freeport Boulevard, persons sleeping outside, and empty alcoholic beverage containers in the neighborhood.

Dr. Mark Sheffield also appeared and testified at the hearing. Dr. Sheffield shares a residence with appellant and testified that he has noticed an increase in the homeless population since 2019. Dr. Sheffield stated that he hears delivery truck back-up beepers in the Park Shopping Center.

Emily Gilbert, whose residence is separated by a six-foot high wooden fence on the east side of her property from the Park Shopping Center, testified that she too hears delivery truck back-up beepers. She also testified that she heard people park their vehicles on the east side of the wooden fence and hang-out during the night until 2:00 a.m. or 3:00 a.m. Ms. Gilbert also said the light from the Park Shopping Center shines into her yard, and that she has noticed an increase in homeless persons in the neighborhood since moving there in 2016.

Kristopher Barton appeared at the hearing and testified that he has worked for respondent for 27 years running the operations at different Raleys stores. Mr. Barton

worked at respondent's former location across the street for six years. Mr. Barton now works at respondent's new location.

Mr. Barton stated that respondent's team leadership and members are assigned daily shifts to walk the parking lot to pick up litter, collect carts, assist customers, and provide overall upkeep of the building as well as areas adjacent to the premises. Further, Park Shopping Center property management hired a janitorial service which keeps the entire Park Shopping Center site clean and nice, by removing trash, litter, and emptying garbage cans daily.

Mr. Barton also testified there are in-store security guards that do security sweeps of the premises and adjacent property on a regular basis, from the early morning through the evening and overnight. According to Mr. Barton, the lot where Raleys constructed the premises was formerly Capital Nursery, which closed in approximately 2012. After Capital Nursery's closure, the lot became a vacant, empty field used by squatters, which was drug-infested and had prostitution occurring on-site. When Raleys began clearing the open field and renovating the site, it cleaned up the area and the prior problems.

The administrative law judge (ALJ) issued a proposed decision on April 7, 2021, overruling appellant's protest, and recommending that the requested licenses issue to respondent, subject to the conditions set forth in the Petition for Conditional License. The Department adopted the proposed decision on May 21, 2021 and issued a certificate of decision on June 1, 2021. Appellant filed a timely appeal contending that:

- 1) the Department erred in applying the "substantial evidence" standard to determine whether it performed a thorough investigation of the premises prior to issuing the license;
- 2) the ALJ erred when sustaining respondent's objection regarding Arora's knowledge of

noise and noise mitigation and the existing wooden picket fence; 3) respondent has not complied with its Department-imposed conditions; 4) the Department violated the 14th Amendment by placing different conditions for establishments that are similarly situated, and; 5) the ALJ exhibited bias towards respondent in the proposed decision.

DISCUSSION

I

SUBSTANTIAL EVIDENCE

Appellant contends that the Department incorrectly applied the standard for “substantial evidence” in its decision. (AOB, at p. 5.) Specifically, appellant argues that the Department “applied the standard that any evidence is substantial evidence” (*Ibid.*) Appellant further contends that the decision is not supported by substantial evidence regarding a “thorough investigation” of the premises. (*Ibid.*)

Business and Professions Code² section 23958 states:

Upon receipt of an application for a license or for a transfer of a license and the applicable fee, the department shall make a thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license and whether the provisions of this division have been complied with, and shall investigate all matters connected therewith which may affect the public welfare and morals. The department shall deny an application for a license or for a transfer of a license if either the applicant or the premises for which a license is applied do not qualify for a license under this division.

The department further shall deny an application for a license if issuance of that license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, except as provided in Section 23958.4.

² All statutory references are to the California Business and Professions Code unless otherwise stated.

Here, the Department found that it “conducted a thorough investigation into the Premises and Applicant.” (Conclusions of Law ¶ 5.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”]; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].) “Substantial evidence” is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

To support its findings, the Department stated:

LR Arora investigated Protestant Sheffield’s concerns, including making visits to the Premises, along with Agent Guillen, and during their combined visits they did not observe any issues of loitering, vagrancy, noise or litter. The Department received no complaints of litter or loitering around the Premises. LR Arora saw ample parking and sufficient lighting in the Premises’ parking lot. LR Arora further observed very little traffic on Freeport Boulevard and no traffic on Wentworth Avenue. [...]

(Conclusions of Law, ¶ 5.) Further, the Department notified the 20 residences within 100 feet of the premises but did not receive a response or protest from any of them. (Finding

of Fact, ¶ 6.) The Department also contacted SPD and requested calls for service within 1,000 feet of the premises from April 2019 to April 2020. (*Id.* at ¶ 8.) The Department reviewed those calls for service, looking for crime patterns, or incidents of vagrancy or loitering at the premises. (*Ibid.*) Finally, the Department reviewed and relied upon documents from respondent regarding its proposed operation and policies. (*Id.* at ¶¶ 7, 12.)

Based on the above, the Department's findings that it conducted a thorough investigation into respondent's application is supported by Arora's testimony and documentary evidence. This evidence constitutes "substantial evidence" as it is "reasonable in nature, credible and of solid value." (*County of Los Angeles, supra*, at p. 814.) While appellant points out several issues with Arora's testimony and the documents the Department relied upon (AOB, at pp. 5-8), it is not the Board's job to second-guess the quality of the evidence in the record. As both the Department and respondent stated in their briefs, the Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 837].) Therefore, the Department's decision on this issue stand.

II

EVIDENTIARY ISSUES

Appellant raises two issues regarding evidentiary objections in her brief: 1) the ALJ erred in sustaining respondent's objection to appellant's questions regarding Arora's

qualifications as a noise expert (AOB, at p. 9), and; 2) the ALJ erred in sustaining respondent's objection to appellant's question regarding whether a wooden fence constructed between the premises and the neighboring residences was within the "Sacramento Building Code specification ... and who controls the fence." (*Id.* at p. 10.)

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence ... which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const, art. XX, § 22 [providing remand as remedy in such cases].)

Generally, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevance cannot be established by speculative inferences. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal. Rptr. 69]; *People v. Brady* (2006) 129 Cal.App.4th 1314, 1337-1338 [29 Cal.Rptr.3d 286].)

Relevant evidence may nonetheless be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Stated another way, relevant evidence may be excluded "where, though material, it would have been merely cumulative or corroborative of evidence properly in the record." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 431, at pp 486-487, citing *Silvey v. Harm* (1932) 120 Cal.App. 561 [8 P.2d 570] [excluding cross-examination regarding witness' sobriety, while error, was not prejudicial, since witness' testimony was corroborated by other witnesses whose sobriety was unquestioned].)

The Government Code substantially relaxes the rules of evidence for purposes of administrative proceedings:

The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code, § 11513(c).) Nevertheless, the trier of fact in an administrative hearing "is vested with wide discretion in deciding relevancy, and its determination will not be disturbed on appeal unless there is a clear showing of abuse." (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].)

Finally, the California Constitution provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13, emphasis added.) Thus "even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless such error resulted in a miscarriage of justice." (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142 [104 Cal.Rptr.3d 291].) The burden falls on the complaining party "to demonstrate it is reasonably probable a more favorable result would have been reached absent the error." (*Ibid.*, citing *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432 [77 Cal.Rptr.2d 574]; see also *Estate of Thottham* (2008) 165 Cal.App.4th 1331, 1341-1342 [81 Cal.Rptr.3d 856] ["Error in excluding evidence is a ground for

reversing a judgment only if the error resulted in a miscarriage of justice, and that a different result would have been probable if the error had not occurred."].)

A. Objection Regarding Arora's Opinion on Decibel Levels

Appellant contends that the ALJ wrongfully sustained a relevance objection to "further questioning about sound ... and no further questions were allowed regarding sound and sound mitigation." (AOB, at p. 9.) The following excerpt from the transcript contains the entire exchange:

[Appellant:] And if you know what level decibel would you consider an interruption of quiet enjoyment?

MS. JOHNS: Objection, speculative. [Arora] is not an expert, noise expert.

THE COURT: Sustained.

(RT at pp. 71:22-72:1.) Appellant did not ask any more questions regarding sound or sound mitigation and the witness was dismissed, pending recall. (RT at p. 72:2-25.)

It is clear from appellant's question that she was looking for Arora's opinion regarding what decibel level would be considered an interruption of quiet enjoyment. A lay witness may only give testimony in the form of an opinion if the opinion is "[r]ationally based on the perception of the witness." (Evid. Code, § 800(a).) Appellant did not ask for Arora's opinion based on her personal perceptions of the decibel level at the licensed premises, or if she even had one.³

³ Appellant could have re-asked, after the objection was sustained, whether Arora had an opinion regarding the decibel level at the premises, based on her personal observations during her two visits there. If Arora did have an opinion, appellant could have then elicited that opinion as a lay witness.

The only witnesses allowed to offer opinions not based on personal perception are expert witnesses. However, expert witnesses may only give testimony in the form of an opinion if they are *qualified* to testify as an expert. (Evid. Code, §§ 801, 802 [“A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education)”].) There was no attempt to qualify Arora as a noise expert by any of the parties. Thus, the ALJ properly sustained the objection to appellant’s question since Arora is not an expert on noise decibels, and cannot give her opinions on that subject.

Appellant argues that, even if Arora is not a noise expert, respondents opened the door by posing “a question to LR Arora ‘on the issue of noise.’ ” (AOB, at p. 9.) However, the portion of the transcript cited by appellant has nothing to do with qualifying Arora as a noise expert or even soliciting Arora’s opinion regarding noise. (RT at p. 57:19-22.) The question, posed by respondent’s attorney, asked Arora “on the issue of noise, you indicated that Ms. Sheffield did not live immediately next to the wall; is that correct?” (*Id.* at p. 57:19-21.) Arora responded, “correct.” (*Id.* at p. 57:22.) The question was whether or not appellant lived immediately next to the wall at the premises, which Arora was able to answer based on her personal knowledge of the premises.

Finally, even though the Board finds that the ALJ properly sustained respondent’s objection to appellant’s question eliciting Arora’s non-expert opinions on decibel levels, there was nothing stopping appellant from offering her own expert witness qualified to testify as to decibel levels and their impact on the quiet enjoyment of her residence. This

would have been the best course of action if she felt that this testimony was vital to her appeal.

B. Objection Regarding the Sacramento Building Code

Appellant argues that the ALJ erred in sustaining her objection regarding “whether the wooden picket fence is within the Sacramento Building Code specification that separates the Premises of the Park Complex from the neighbors ... and who controls the fence.” (AOB, at p. 10.) Appellant argues that the building code is relevant since the fence “is relied on for non-[interference] and used to demonstrate generous behavior” (*ibid.*) The exchange from the transcript regarding this issue is as follows:

[THE PROTESTANT:] [...] So would it surprise you now to learn that the – I’m just going to call it the picket wood fence is actually not in compliance with the building code of Sacramento?

MS. JOHNS: Objection, relevance.

THE COURT: Sustained. The objection is sustained.

THE PROTESTANT: Well, can I say something, Judge?

THE COURT: Just to clarify, how is a compliance with a building city code relevant to the issues which I am considering here today[?]

THE PROTESTANT: Because the department is stating that the fence in question, the wood picket fence, is within code and she actually called the planning city, the planning commission and they stated everything was in code, and yet since, the planning commission has come out to say that it is not within the code and that it needs to be a solid masonry wall.

THE COURT: Just to clarify, Ms. Sheffield, that is still – my ruling is sustained, and if you want to clarify with the witness which code she was referring to, it looked like she was trying to raise her hand and wanted to respond to something to clarify what it was that she received from the planning department that was in compliance.

THE WITNESS [Arora]: Yes. So department has only confirmed couple things with the planning department, like we always do. One of the things was how are the applicant premises zoned, and does zoning permit

intended use, or is conditional use permit is needed. So these were the questions that were asked by the department to the Sacramento City Planning Department, and they responded. So I have never questioned the Sacramento City Planning Department about the fencing and its code related to it.

(RT at pp. 66:11-67:17.) Just like the issue with the decibel levels, appellant failed to rephrase her question, ask additional questions, or attempt to introduce the evidence through her own witness. Further, the Board notes that Arora answered appellant's question, even though the ALJ sustained respondent's objection. (*Id.* at p. 67:15-17 ["So I have never questioned the Sacramento City Planning Department about the fencing and its code related to it."].) Nevertheless, the Board agrees that the question asked by appellant is not relevant to the issue of whether the requested licenses shall issue.

As stated above, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Whether the fence complies with the Sacramento Building Code is not a disputed fact of consequence to the determination of the action. The only evidence regarding the wooden fence offered by the Department is that they considered it as a factor, among other factors, as providing quiet enjoyment for the neighbors. (RT at p. 66:6-10.) The Department made no representations that the fence was built according to the Sacramento Building Code, or that they considered it as a factor of non-interference *because* it was built according to the code. Further, evidence offered at the hearing established that the fence was the responsibility of the developer, not respondent. (*Id.* at pp. 100:17-20; 101:1-6; 102:22-103:2; 120:14-17.) Based on the evidence in the record, and the issues before the ALJ and Department, the fact that wooden fence was not built

according to the Sacramento Building Code is not relevant to the ultimate determination of the action.

III

LICENSE CONDITIONS

Appellant raises the issue of whether respondent has complied with the conditions on its requested licenses. (AOB, at pp. 12-14.) Appellant argues that “[t]here must be credible substantial evidence that the conditions of non-[interference] have been met.” (*Id.* at p. 12.) Appellant cites no legal authority for the requirement that respondent must show compliance with its conditions as a prerequisite to the Department issuing it a license.

In fact, violations of the proposed conditions of the license are not at issue in the decision;⁴ rather, the administrative hearing and follow-on decision determined whether the requested alcoholic beverage licenses shall issue. The purpose of the conditions was to “mitigate the Protestant’s concerns as well as any adverse impact to the nearby residences.” (Findings of Fact, ¶ 19.) The tenor of appellant’s argument is not that respondent is violating the conditions, but that the conditions have not achieved, or will not achieve, their stated purpose, e.g. to mitigate adverse impact to the area and nearby residences. (AOB, at pp. 12-14.) However, this argument misses the mark.

Whether the conditions achieve their intended goals is beside the point. The conditions were not guarantees that appellant’s concerns would be mitigated or that the nearby residences would not suffer any adverse impact. The conditions represent

⁴ Whether respondent violated the conditions of its licenses would be the subject of a disciplinary action against respondent by the Department.

Department's attempt, with input and recommendations by SPD, to limit the negative impact of the premises in the area. The Department has been given broad discretion by the Legislature, as interpreted by the courts, with respect to the issuance or denial of a license. In *Koss*, that discretion was described this way:

[T]he Department exercises a discretion adherent to a standard set by reason and reasonable people, bearing in mind that such a standard may permit a difference of opinion on the same subject. If the decision is reached without reason under the evidence, the action of the Department is arbitrary, constitutes an abuse of discretion, and may be set aside. Where the decision is the subject of a choice within reason, the Department is vested with the discretion of making the selection which it deems proper; its action constitutes a valid exercise of that discretion; and the Appeals Board or the court may not interfere therewith.

(*Koss v. Dept. of Alcoholic Bev. Control* (1963) 215 Cal.App.2d 489, 496 [30 Cal.Rptr.2d 219].)

The Department's decision lays out in detail the evidence supporting the ALJ's recommendation that the license should issue, and for the conclusion that the conditions would mitigate concerns of crime, loitering, and vagrancy, as well as other adverse impact to the nearby residences. Appellant clearly favors different conclusions, but mere disagreement with a decision is not grounds for reversal, when, as here, the imposition of the five conditions is a "choice within reason." (*Ibid.*)

IV

14TH AMENDMENT

Appellant argues that the Department violated the 14th Amendment of the United States Constitution by placing different conditions on the Shift Change, a similarly situated licensed premises located near the premises. (AOB, at pp. 14-16.) Appellant states, "[b]oth Respondent/Applicant and *The Shift Change* are similarly situated except for the

fact that the owner of *The Shift Change* is a non-Caucasian and the owner of Applicant/Raley's is Caucasian. (*Id.* at p. 15.) Yet, appellant alleges, the Shift Change is prohibited by conditions on its license from selling distilled spirits in bottles or containers of "more than 750 ml and wine with an alcohol content in excess of fifteen percent by volume." (*Ibid.*) Appellant offers no evidence to support these assertions.

Regardless, this issue is irrelevant for purposes of this appeal. If the Department has imposed more restrictive conditions on the Shift Change because of the owner's nationality or race, that cause of action lies with the Shift Change, not with appellant. (See *Barrows v. Jackson* (1953) 346 U.S. 249, 255 [73 S.Ct. 1031, 1034, 97 L.Ed. 1586] ["Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party."]). Thus, the Board declines to consider appellant's argument that the Department violated the 14th Amendment.

V

ALJ BIAS

Appellant contends that the ALJ demonstrated bias towards respondents when she made unsubstantiated statements and corrections in the decision. (AOB, at pp. 16-18.) Specifically, appellant argues the ALJ provided her "unsubstantiated opinion" regarding the increase of the homeless population due to the COVID-19 pandemic in her proposed decision. (*Id.* at p. 17.) Based on ALJ Hubel's statements, appellant concludes that she "most likely engaged in independent research regarding the matter [in violation of the Code of Judicial Ethics]." (*Ibid.*)

First, a review of the record indicates that there was testimony to support the ALJ's statement that homelessness and vagrancy has increased during the pandemic, at least

in the area near the premises.⁵ (RT at pp. 126:5-14; 127:9-16; 138:12-139:20; 140:9-141:2; 146:19-147:2, and; 167:23-168:3.) On those grounds, alone, the Board finds no evidence of bias by the ALJ or Department. Second, as the Department points out, Government Code section 11425.50(c) allows an ALJ to use his or her “experience, technical competence, and specialized knowledge [...] in evaluating evidence.” Appellant offers no evidence that the ALJ does not have experience, technical competence, or specialized knowledge regarding homelessness or vagrancy during the pandemic. For these reasons, the Board finds the statement regarding homelessness during the pandemic to be supported by evidence in the record.

ORDER

The decision of the Department is affirmed.⁶

SUSAN BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
SHARLYNE PALACIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ In fact, this evidence came from appellant or from appellant’s witnesses.

⁶ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

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

APPENDIX

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

IN THE MATTER OF THE PROTEST OF:

D. ELIZABETH SHEFFIELD

AGAINST THE ISSUANCE OF A LICENSE TO:

RALEYS
RALEYS 415
4690 FREEPORT BLVD
SACRAMENTO, CA 95822

OFF-SALE GENERAL AND ON-SALE BEER AND
WINE EATING PLACE AND INSTRUCTIONAL
TASTING - LICENSE

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

SACRAMENTO DISTRICT OFFICE

File: 21/41/86-615465

Reg: 20090506

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 21, 2021. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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**Alcoholic Beverage Control
Office of Legal Services**

Sacramento, California

Dated: June 1, 2021



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE PROTEST OF:

D. Elizabeth Sheffield,

AGAINST THE ISSUANCE OF AN
OFF-SALE GENERAL,
ON-SALE BEER AND WINE EATING PLACE, AND
INSTRUCTIONAL TASTING LICENSES TO:

Raleys

Db: Raleys 415

4690 Freeport Boulevard

Sacramento, California 95822

} File: 21/41/86-615465

} Reg.: 20090506

} License Types: 21/41/86

} Word Count: 33,596

} i-Depo Reporter & Video Host:

} Court Reporter: Zoanne Williams

} Video Host: Addison Green

Under the Alcoholic Beverage Control Act

} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference in California, on February 23, 2021.

Lisa Wong, attorney, represented the Department of Alcoholic Beverage Control (the Department).

Melani Johns, attorney, represented the Applicant, Raleys.

Protestant Diane Elizabeth Sheffield appeared and was not represented by counsel. The Protestant was allowed to appear and participate in the hearing as a party pursuant to Government Code section 11500(b).

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 23, 2021.

ISSUES

The issues to be determined are whether issuance of the applied-for licenses would be contrary to public welfare or morals on the basis that they would (1) interfere with nearby

residents' quiet enjoyment of their property, (2) tend to create law enforcement problems/crime, (3) create problems related to loitering, vagrants and traffic.¹

FINDINGS OF FACT

1. The Applicant seeks issuance of a type-41 on-sale beer and wine eating place license and seeks a premise-to-premise transfer for a type-21 off-sale general license and a type-86 instructional tasting license for its premises located at 4690 Freeport Boulevard in Sacramento, California (hereinafter the Premises).² The type-41 license requires the Premises operate as a bona fide eating place, (aka, a restaurant), which is located in the mezzanine depicted in the ABC-257. (Exhibit D6.) The Applicant's former Raleys premises was originally located at 4850-80 Freeport Boulevard (Exhibits D10 and D11, A3) and moved approximately 500 feet across the street to the current location of the Premises at 4690 Freeport Boulevard. (Exhibits D8, D9 and A3.) The former Raleys location at 4850-80 Freeport Boulevard held both a type-21 and type-86 license. The Department conducted a thorough investigation into the Applicant and the Premises with respect to the applied-for licenses. The Department's Licensing Representative Arora (hereinafter referred to as LR Arora) prepared a report based on her investigation. (Exhibit D2 – ABC-220-P.)

2. The Premises is a newly built two-story variety/retail grocery store measuring approximately 307 feet by 200 feet. It has an assortment of houseware items, groceries, dairy, snacks and beverages. The Premises is located in a retail shopping plaza called the Park Shopping Center, in a mixed commercial and residential area. The Premises faces east toward Freeport Boulevard, a major thoroughfare, and is adjacent to a small cross street, Wentworth Avenue, which is south of the Premises. The Premises shares a large parking lot with other retailers, which parking lot has abundant parking for customers and the Premises' employees. The Applicant's hours of operation are from 6:00 a.m. to 11:00 p.m. each day of the week. (Exhibits D3, D4, D5, D6, D7, D9.)

3. The current location of the Premises at 4690 Freeport Boulevard has never been licensed. The Premises was issued an Interim Operating Permit (IOP)³ on April 10, 2020 and opened for business on April 15, 2020. It has been operating under the IOP with no incident, complaint, disciplinary history or documented law enforcement issues. The former Raleys location at 4850-80 Freeport Boulevard, with its type-21 and type-86

¹ At the beginning of the hearing, the undersigned indicated to all parties all issues which would be considered. The parties did not object to the issues as stated by the undersigned.

² For clarification, "the Premises" will mean both the type-41 and types-21/86 applied-for premises, as covering separate applied-for spaces (not concurrently licensed spaces) within one building, with one common applicant.

³ An interim operating permit temporarily allows an applicant to exercise the same privileges of the license being applied for pending the final outcome of the application process.

licenses, had no conditions upon the licenses and sold beer, wine and distilled spirits since July of 1964, with no disciplinary history.

4. The Premises complies with local zoning requirements. A conditional use permit is not required.

5. There are no churches or hospitals within the immediate vicinity of the Premises. There are no schools, public playgrounds or nonprofit youth facilities within 600 feet of the Premises.

6. There are 20 residences located within 100 feet of the Premises, with the closest residences approximately 70 feet west⁴ of the Premises, which are located at the rear of the Premises, with separation factors of an alley, cypress trees and a nine-foot high block wall. The separation factors for the other residences are a nine-foot block wall, an alley, and cypress trees approximately 20 feet apart, which are anticipated to grow and provide an additional sound barrier. The other residences are located either northeast, north, northwest, west, and southwest of the Premises. The Department notified the 20 residences of the applied-for licenses and received no response or protest therefrom.

7. On April 8, 2020, the Applicant submitted to the Department a letter describing how the Premises' operation with issuance of the type 21, 41 and 86 licenses would not interfere with nearby residences' quiet enjoyment of their property. The Applicant explained how they have continuously been a good neighbor with no disciplinary history since July 1964 at its former location and continuing at its current location. The sale of beer, wine and distilled spirits will be ancillary to its use as an essential service community grocery store. The Applicant estimates approximately 18 feet of shelf space, and one 12-foot wide cooler will be devoted to the display of beer, wine and distilled spirits; and the sale of alcoholic beverages will amount to less than 11 percent of total sales at the Premises. The Premises will sell craft, domestic and international beers, with wine offered at various price points and predominantly consisting of well-known brands which appeal to light or moderate social drinkers. The Premises will not sell mini bottles of distilled spirits and its inventory will not appeal to panhandlers, vagrants or criminal elements. Its planned operation is to have minimal impact on the social, environmental, or law enforcement issues in the community. Based on their vast experience in the grocery business, the Applicant finds its client base purchase alcohol as part of their regular grocery shopping. The sales of alcoholic beverages will be a convenience for its customers, and the Applicant anticipates minimal, if any, changes regarding the existing

⁴ The ABC-220-P recited the distances of the 61.4 residences, including the closest of which was listed at 70 feet, and supplemented LR Arora's testimony. (Exhibit D2.) However, it became clear from the witness testimony that some of the residences and the position of the Premises were listed incorrectly in the ABC-220-P in terms of their directional proximity (in other words north, south, east and west). The undersigned corrected those directional proximities.

number of customers, truck deliveries, amount of traffic, or noise emanating from the Premises. The Applicant has taken preventative measures to ensure beer, wine and distilled spirits are sold in a responsible manner. It has in place detailed alcohol sales policies and procedures, which are strictly enforced. The Premises has closed-circuit security cameras monitoring the alcohol sales area and a public view monitor, which serves to discourage loitering. The beer, wine and distilled spirits will not be located near any exit to discourage theft. The parking lot is well illuminated. (Exhibit D14.)

8. The Sacramento Police Department (Sacramento PD) has jurisdiction over the area where the Premises is located. The Sacramento PD does not provide statistical data within the meaning of Section 23958.4. The Department requested calls for service within 1000 feet of the Premises from April 2019 to April 2020, which the Sacramento PD provided. The Department reviewed the calls for service and determined there were no unusual crime patterns, nor calls for service at the Premises for vagrancy or loitering. LR Arora determined there to be no evidence of high crime in the area. (Exhibit D2.)

9. On February 28, 2020, an ABC-211 was mailed to the Sacramento PD notifying it of the said application. On April 6, 2020, the Department received from the Sacramento PD a conditional protest letter, which stated that if the Applicant agreed to three conditions the Sacramento PD's protest would be deemed withdrawn. LR Arora added two additional conditions for a total of five conditions to be imposed upon the licenses should they issue. On April 7, 2020, the Applicant signed and agreed to the requested operating conditions to allay any concerns of the Department and Sacramento PD, and the Sacramento PD's protest was effectively withdrawn. (Exhibit D12 – copy of Petition for Conditional License.)

10. The Premises is located in census tract 0033.00. Using the formula set forth in the Alcoholic Beverage Control Act, two (2) off-sale licenses and four (4) on-sale licenses are permitted within this census tract. As of the hearing, seven (7) off-sale licenses and ten (10) on-sale licenses have been issued in that census tract.

11. There are no grocery stores which sell alcohol within 1000 feet of the Premises. The closest such grocery store is Oto's Marketplace at 4990 Freeport Boulevard, which is approximately 1,325 feet south of the Premises. (Exhibit D8.) Oto's Marketplace has held a type-20 off-sale beer and wine license since July 20, 2007, with no conditions thereon and no violations since issuance of its license.

12. On March 18, 2020, the Applicant submitted a letter of public, convenience or necessity (PCN) for its type-41 on-sale beer and wine eating place license. The restaurant is located within the Premises for customers who prefer to enjoy a sit-down meal, with offerings of full meals, side dishes and appetizers. The menu includes quick gourmet style sandwiches, grilled paninis and side dishes made with the finest, fresh ingredients

available. The type-41 license is sought to appease customer requests and expectations of an assortment of quality craft beers and local as well as international wines to compliment customer meals. The sale of beer and wine will account for a small portion of the restaurant's overall sales. The Applicant believes adding a small, but well-curated selection of quality alcoholic beverages will add to the overall customer experience. The Applicant proposed that public convenience or necessity would be served because there are no other grocery stores with in-store restaurants in the near vicinity with an emphasis on high-quality, quick-to-prepare meals which also sell a similar selection of craft beer and wine, making it a convenient stop for local residents, workers, and commuters. The Applicant will train employees in accordance with responsible alcoholic beverage service policies. The Applicant expects that with the nature of its clientele there will be no additional burden placed on local law enforcement by issuance of the said license. (Exhibit D13.) Based on the Applicant's PCN submission and the Department's verification thereof and thorough investigation, LR Arora determined the Applicant met public convenience or necessity.

13. Protestant Diane Elizabeth Sheffield appeared and testified at the hearing. Mrs. Sheffield has, since May of 2019, resided at 1901 Wentworth Avenue in Sacramento, which is approximately 437 feet south of the Premises, with separation factors of four retail stores, a parking lot, an alley, and a nine-foot block wall. (Exhibit D8.) When Mrs. Sheffield moved to the neighborhood she knew the former Raleys, located 4850-80 Freeport Boulevard, sold alcoholic beverages and she was aware a new Raleys (the Premises) was going to be constructed at the site across the street at 4690 Freeport Boulevard. Mrs. Sheffield said where she grew up, she was brought up with a Raleys and likes the current Premises and hopes it does well. Mrs. Sheffield's concerns with the addition of another alcoholic beverage license is that she anticipates it will potentially increase truck deliveries, noise and keep the homeless in the neighborhood.

14. Mrs. Sheffield took photographs in the neighborhood, including of a homeless person pushing a tarp-covered shopping cart southbound on Freeport Boulevard, persons sleeping and empty alcoholic beverage containers in the neighborhood. One photograph was of an empty beer can in the landscape of the Park Shopping Center. Mrs. Sheffield acknowledged she does not know from where the alcoholic beverages originated and could not conclusively say they were purchased at or that they came from the Premises. (Exhibits P4, P5, P6, P7, P8, P9, P10, P11, P15, P18, and P19.)

15. Dr. Mark Sheffield appeared and testified at the hearing. Dr. Sheffield has been a co-owner of 1901 Wentworth Avenue in Sacramento since May of 2019. Construction of the Premises was occurring when he purchased the property. Dr. Sheffield splits his residency between the 1901 Wentworth Avenue home and another property of unknown location. Dr. Sheffield noticed an increase in the homeless population since 2019. Dr. Sheffield had heard delivery truck back-up beepers in the Park Shopping Center. There

was no evidence as to what hour(s) or when the sound was heard and whether it disturbed the quiet enjoyment of his property. Dr. Sheffield has not actually measured any noise emitting from the Premises. Dr. Sheffield did not file a protest against the issuance of the applied-for licenses.

16. Emily Gilbert appeared and testified at the hearing. Ms. Gilbert has resided at 1909 Wentworth Avenue in Sacramento since September of 2016. A six-foot high wooden fence is located on the east side of her property and separates her yard from the Park Shopping Center. When Ms. Gilbert moved into her residence the former Raleys at 4850-80 Freeport Boulevard existed across the street and sold alcoholic beverages. Ms. Gilbert did not file a protest against issuance of the applied-for licenses at the Premises (4690 Freeport Boulevard). Ms. Gilbert said she has heard delivery truck back-up beepers in the alley of the Park Shopping Center. There was no evidence as to what hour(s) or when the sound was heard and whether it disturbed the quiet enjoyment of her property. She has also heard people park their vehicles on the east side of the wooden fence and hang-out, for example during the night until 2:00 a.m. or 3:00 a.m. There was no evidence as to whether the persons involved came from or were associated with the Premises. Ms. Gilbert said the light in the Park Shopping Center shines into her yard. Ms. Gilbert has noticed an increase in homeless persons in the neighborhood since moving there in 2016. Ms. Gilbert acknowledged both the increase of the homeless population since the COVID-19 Pandemic and that this issue of homelessness is not isolated to her neighborhood. There was no evidence of a connection between the Premises with its applied-for licenses and either the homeless population or increase thereof.

17. LR Arora made two visits to the Premises, including, on March 10, 2020, at approximately 10:00 a.m., and on or about April 10, 2020, at approximately 1:30 p.m. On April 7, 2020, Agent Guillen visited the Premises, conducted an inspection, and observed no loitering or vagrancy. During LR Arora's visits she did not observe any noise, loitering, vagrancy or litter. She observed very little traffic on Freeport Boulevard and no traffic on Wentworth Avenue. She saw 10 cars parked in the parking lot near the Premises and determined there to be ample parking for the Premises' customers and employees. There was sufficient lighting in the parking lot which she determined would not disturb the nearby residents. The Department has received no complaints about litter or loitering around the Premises. LR Arora determined the Department has no jurisdiction over traffic.

18. Based on the Department's investigation and the Sacramento PD's requested three conditions, the Department recommended a total of five conditions be attached to the applied-for licenses should they issue. The Applicant agreed to these conditions on April 7, 2020, as referred to above. These include conditions that (1) sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 6:00

a.m. and 11:00 p.m. each day of the week; (2) the petitioner(s) shall be responsible for maintaining free of litter the area adjacent to the premises over which they have control as depicted on the most recently certified ABC-257 and ABC-253; (3) the parking lot of the Premises shall be equipped with lighting of sufficient power to illuminate and make easily discernible the appearance and conduct of persons on or about the parking lot. Additionally, the position of such lighting shall not disturb the normal privacy and use of any neighboring residences; (4) petitioner(s) shall actively monitor the area under their control in an effort to prevent the loitering of persons on any property adjacent to the licensed premises, as depicted on the most recently certified ABC-253; and (5) signs shall be posted at all exits leading into the designated off-sale premises from the designated on-sale premises stating, "NO OPEN CONTAINERS OF ALCOHOLIC BEVERAGES BEYOND THIS POINT." Said signs shall measure no less than seven inches by eleven inches (7"x11") and contain lettering no less than one inch in height. (Exhibit D12.)

19. In the Department's opinion, these conditions, as well as the Applicant's planned operation for PCN and non-interference, would mitigate the Protestant's concerns as well as any adverse impact to the nearby residences. Based on the Department's investigation, the Applicant's planned operation, its agreed to operating conditions, and self-imposed restrictions, along with the Sacramento PD's withdrawal of its protest and the Department's determination that public convenience or necessity would be met by issuance of the license, the Department recommended the licenses issue subject to the foregoing conditions.

20. Kristopher Barton appeared and testified at the hearing. Mr. Barton has worked for Raleys for 27 years running the operations of different Raleys stores. He worked as the team leader for six years at the Raleys located at 4850-80 Freeport Boulevard in Sacramento, and then as the team leader at the Premises located at 4690 Freeport Boulevard when it opened on April 15, 2020. He currently works as the team leader at the Raleys Bel Air store in Elk Grove, Sacramento. He has worked there for approximately five weeks as of the date of the hearing. The Applicant Premises has been complying with the conditions in the Petition for Conditional License. As for condition number two, maintaining free of litter the area adjacent to the Premises over which the Applicant has control, the Applicant's team leadership and members are assigned shifts on a daily basis to walk the parking lot to pick up litter, collect carts, assist customers, and provide overall upkeep of the building as well as areas adjacent to the Premises. Property management hired a janitorial service which keeps the entire Park Shopping Center site clean and nice, by removing trash, litter and emptying garbage cans daily. As for condition number three, the Applicant Premises complies by keeping the parking lot well-lit with solar powered lights. Regarding condition number four, the Applicant's team members and leadership actively monitor the area under the Applicant's control in an effort to prevent loitering, by asking the said loiterers to move along and leave the vicinity, advising they cannot loiter. The Premises has in-store security, which was

initially performed by the Sacramento PD when the store opened and later transitioned to an armed security guard service. The security guard service performs security sweeps of the Premises and adjacent property on a regular basis, from the early morning through the evening and over-night. In Mr. Barton's opinion the armed security guard service does a "really good job handling issues." The lot where Raleys constructed the Premises was formerly Capital Nursery, which closed in approximately 2012, after which, Mr. Barton said, the lot became a vacant, empty field, used by squatters, was drug-infested, and had prostitution occurring on the site. Mr. Barton explained that "it was pretty bad at times." He said that when Raleys began clearing the open field and renovating the site, Raleys cleaned up the area and the prior problems. In Mr. Barton's experience and opinion, the problems on the site of litter and vagrancy decreased "100 percent."

21. Chelsea Minor appeared and testified at the hearing. Ms. Minor will have worked for Raleys for six years as of March 2021. She is the corporate director of public affairs and the company spokesperson, handling all external issues. Ms. Minor first spoke with Mrs. Sheffield on approximately April 10, 2020 and had several communications with her via e-mail thereafter. Ms. Minor attempted to assist in addressing Protestant's concerns, which related to requesting (1) speed bumps be placed on Wentworth Avenue to relieve potential traffic that may occur since the city installed a median/round-about on Wentworth Avenue, as well as (2) the addition of trees and (3) an upgrade to the wooden fence on the easterly side of the 1909 Wentworth Avenue home. Ms. Minor explained to the Protestant that those issues were out of the Applicant's control, since the Applicant was a tenant. Ms. Minor referred the Protestant to contact the city to address any traffic concerns she had and any request for speed bumps on Wentworth Avenue. While Ms. Minor referred the Protestant to the land developer to address the fencing and tree concerns, Ms. Minor contacted the land developer to request the vegetation issue be incorporated in the developer's plans and the fence issue be addressed. The developer remedied and closed off a small portion of the property lines to address Protestant's additional loitering concerns.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution delegates the exclusive power to license the sale of alcoholic beverages in this state to the Department of Alcoholic Beverage Control.
2. Business and Professions Code section 23958⁵ requires the Department conduct a thorough investigation to determine, among other things, if the Applicant and the Premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application

⁵ All statutory references are to the Business and Professions Code unless otherwise noted.

which may affect public welfare or morals. It provides, in part, that the Department shall deny an application for a license if the Applicant or the Premises do not qualify for a license under the Act.

3. In a protest matter, the Applicant bears the burden of establishing it is entitled to a liquor license from the start of the application process until the Department makes a final determination.⁶

4. In cases involving an application for an original license or the premises-to-premises transfer of a retail license, rule 61.4⁷ 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.

5. There are 20 residences located within 100 feet of the Premises. As such, rule 61.4 applies. The Department mailed notices to those residences and received no response therefrom. There was no evidence that issuance of the license types would interfere with the quiet enjoyment of nearby residences. The Department conducted a thorough investigation into the Premises and Applicant. LR Arora investigated Protestant Sheffield's concerns, including making visits to the Premises, along with Agent Guillen, and during their combined visits they did not observe any issues of loitering, vagrancy, noise or litter. The Department received no complaints of litter or loitering around the Premises. LR Arora saw ample parking and sufficient lighting in the Premises' parking lot. LR Arora further observed very little traffic on Freeport Boulevard and no traffic on Wentworth Avenue. Ms. Minor, Raley's company spokesperson, was correct to refer Mrs. Sheffield to the city regarding her traffic concerns. The Department has no jurisdiction over traffic matters. Additionally, the Applicant's planned operation of non-interference and the manner in which it operates the Premises, coupled with the conditions imposed by the Department, should mitigate any adverse impact from the Premises. Accordingly, issuance of the applied-for licenses should not interfere with the residents' quiet enjoyment of their property and mitigate any concern of Protestant Sheffield.⁸ (Findings of Fact ¶¶ 1-3, 6-9, 14-21.)

6. Section 23789 provides that the Department is specifically authorized to refuse to

⁶ *Coffin v. Alcoholic Beverage Control Appeals Board*, 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420, (2006).

⁷ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

⁸ The 90-day exception in rule 61.4 did not apply in this matter to the type-21 and type-86 licenses since the applied-for Premises location at 4690 Freeport Boulevard in Sacramento had never been licensed in the past with any of the same applied-for license types. Therefore, rule 61.4 applied to all three licenses.

issue any retail license for premises located (a) within the immediate vicinity of churches and hospitals or (b) within 600 feet of schools and public playgrounds or nonprofit youth facilities. In the present case, there were no consideration points. (Finding of Fact ¶ 5.)

7. Section 23958.4 sets forth a two-prong test for determining whether an area has an over-concentration of licenses. The first prong relates to the number of reported crimes in the relevant reporting district, while the second relates to the number of licenses within the relevant census tract. An area is over-concentrated if either prong is met. Even if an area is over-concentrated, the license may still issue if the Applicant demonstrates that public convenience or necessity would be served.

8. With respect to the first prong, section 23958.4 provides that a reporting district is high crime (and, therefore, over-concentrated) if it has a 20 percent greater number of reported crimes, as defined, than the average number of reported crimes as determined from all crime reporting districts within the jurisdiction of the local law enforcement agency. In the present case, the Sacramento PD does not provide statistical data within the meaning of Section 23958.4. Based on the evidence presented, it cannot be said the area in which the Premises is located is over-concentrated based on high crime. (Findings of Fact ¶ 8.)

9. The second prong of section 23958.4 provides that, with respect to on-sale and off-sale retail licenses, a census tract is over-concentrated if the ratio of on-sale and/or off-sale retail licenses to population in the census tract in which the applied-for premises is located exceeds the ratio of on-sale and/or off-sale retail licenses to population in the county in which the applied-for premises is located. The Premises is located in census tract 0033.00. Two (2) off-sale licenses and four (4) on-sale licenses are permitted within this census tract. As of the hearing, seven (7) off-sale licenses and ten (10) on-sale licenses exist. There already is an overconcentration of licenses in the census tract. The Premises would add one more on-sale license should its type-41 on-sale beer and wine eating place license be issued. The type-21 and type-86 licenses would be premises-to-premises transfers within the same census tract so they would not create or add to the license count in the census tract. Therefore, section 23958.4 would not apply to those licenses. (Finding of Fact ¶¶ 1 and 10.)

10. As to the type-41 license application, since it is in an overconcentrated census tract, a determination of public convenience or necessity is necessary before it may issue. The Applicant has established public convenience or necessity would be served. There are no other grocery stores with an in-store restaurant within 1000 feet of the Premises and which has an emphasis on high-quality, quick-to-prepare meals with a similar selection of quality craft beers and international wines, that make it a convenient stop for local residents, workers, and commuters. The Applicant will train employees in accordance with responsible alcoholic beverage service policies. (Findings of Fact ¶¶ 11 and 12.)

11. Mrs. Sheffield voiced concerns that she anticipated the addition of another alcoholic beverage license would potentially increase truck deliveries, noise and keep the homeless in the neighborhood. There was no evidence that truck deliveries or noise have increased, let alone that the homeless would remain in the neighborhood, should the applied-for licenses issue. While the Applicant's non-interference letter noted a potential for minimal, if any, increase in truck deliveries, there was no evidence that the Premises' truck deliveries have increased or interfered with the quiet enjoyment of properties since issuance of the IOP. The homeless population is not an issue which has been isolated to the area in which the Premises is located. There has, unfortunately, been an increase nationwide in the homeless population due to the COVID-19 Pandemic. There was no evidence presented to connect the presence or increase of the homeless population to the Premises and its applied-for licenses. The evidence did establish that with the Applicant's renovation and clean-up of the vacant lot where the Premises was newly constructed along with the Applicant's daily monitoring, armed security guard service and compliance with conditions, these efforts have resulted in ridding the site of the prior problems of vagrancy, loitering, prostitution, drug infestation and squatters.

12. Although Mrs. Sheffield opined concern regarding an increase in crime or law enforcement problems, there is no credible evidence of such. Great deference is given to the opinion of local law enforcement officials when it comes to issues of crime and law enforcement. The Sacramento PD has no objection to issuance of the applied-for licenses, subject to the said conditions. In addition, the Premises has been operating under its IOP since April 15, 2020, with no disciplinary history, law enforcement problems, violations or complaints. There is insufficient evidence that issuance of the applied-for licenses with the said conditions would tend to create a law enforcement problem in the area. (Findings of Fact ¶¶ 3, 8, 9, 17 and 20.)

13. Finally, the Applicant has made specific efforts to ensure the Premises is a good neighbor. These efforts include its (1) continuous operation at its former site since 1964 without discipline, (2) policy of daily litter removal from the Premises, including adjacent areas under its control, (3) policy of active monitoring of the area to prevent loitering, (4) contracting with an armed security guard service to conduct security sweeps of the Premises and adjacent property on a regular basis, (5) self-imposed operational policy of not selling mini bottles of distilled spirits and maintain an inventory which will not appeal to panhandlers, vagrants or criminal elements, and (6) installation of closed circuit security cameras to monitor the alcohol sales area and a public view monitor to discourage loitering. All of the foregoing was done to protect the surrounding neighborhood from any adverse impact due to the Applicant's planned operation. These efforts will further mitigate Protestant's concerns. (Findings of Fact ¶¶ 3, 7, 20 and 21.)

14. Except as set forth in this decision, all other allegations in the protest and all other contentions of the parties' lack merit.

ORDER

The protest of D. Elizabeth Sheffield is overruled. The type-21 off-sale general, type-86 instructional tasting, type-41 on-sale beer and wine eating place licenses shall issue to Raleys, subject to the conditions set forth in the Petition for Conditional License.

Dated: April 7, 2021



D. Huebel
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ 
Date: _____ 05/21/21