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

AB-9619
File: 41-557796 Reg: 16083886

GOLDEN GATE BELL, LLC,
dba Taco Bell Cantina
710 Third Street, San Francisco, CA 94107-1994,
Appellant/Applicant

v.

JULIE POGGETTI, MICHAEL TSE,
and the SAN FRANCISCO POLICE DEPARTMENT,
Respondents/Protestants
and

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: January 11, 2017
Sacramento, CA

ISSUED FEBRUARY 7, 2018

Appearances: *Appellant/Applicant*: Richard D. Warren as counsel for Golden Gate Bell, LLC, doing business as Taco Bell Cantina.
Respondents/Protestants: Joseph Scoleri and Sean Klein as counsel for respondent Department of Alcoholic Beverage Control. Ronnie M. Wagner as counsel for respondent/protestant San Francisco Police Department. Julie Poggetti and Michael Tse, respondents/protestants, appearing in propria persona.

OPINION

Golden Gate Bell, LLC, doing business as Taco Bell Cantina (appellant/applicant) appeals from a decision of the Department of Alcoholic Beverage Control[1] denying its application for an on-sale bona fide eating place license.

FACTS AND PROCEDURAL HISTORY

1. The decision of the Department, dated October 26, 2016, is set forth in the appendix.

In 2015, appellant/applicant petitioned for issuance of on-sale bona fide eating place license. Protests were filed by local residents Julie Poggetti and Michael Tse, and by the San Francisco Police Department (SFPD). An administrative hearing was held on May 25 and July 21, 2016. At the hearing, oral and documentary evidence was presented concerning the application and the protests.

Testimony established that appellant, doing business as "Taco Bell Cantina" (hereinafter "the Cantina"), opened for business in September 2015 in an approximately 1,200 square foot retail space on the first floor of a large, mixed-use development known as "The Beacon." The Beacon includes several multi-story buildings housing numerous residential units, a pool, and first-floor and some second-floor commercial/retail uses, including a Safeway store. Appellant's premises sits at one corner of the Beacon development, at the intersection of Third Avenue and Townsend Street. Appellant's restaurant holds 49 persons and is open daily from 6:00 a.m. to midnight. It outwardly appears as an "upscale" Taco Bell. Customers order and pick up their food at the counter, selecting items from an overhead menu board. There are tables and chairs for interior dining. It has an open kitchen area. There are no individual menus or waiter/waitress service as in a traditional sit-down restaurant. The premises does have some patio seating; that portion of the business, however, is not part of the applied-for licensed premises. The premises' main entrance is on Third Street. It has a pass-through window to the outside of the premises through which food and soft drinks, ordered on-line, are delivered. Appellant's premises is approximately one block from AT&T Park, home of the San Francisco Giants baseball team.

Appellant's business serves Mexican food such as tacos, burritos, quesadillas, nachos, and assorted soft drinks as would a traditional Taco Bell eatery. Appellant is a franchisee of 85 other Taco Bell restaurants in California. Appellant's food items range in price from as low as $1.00 for certain individual items, to $7.00 for individual combination meal specials, to between $14.00 and $17.00 or more for group meal packages. However, appellant seeks to distinguish this specific site as operating under a novel concept called a "Taco Bell Cantina." The "cantina" concept is inspired by casual beachside restaurants in Mexico as compared to a classic Taco Bell eatery. Under this vision, the interior has been upgraded. It has a large-screen TV, a casual dining atmosphere, and a glass-enclosed visible kitchen area. Appellant indicates this layout is similar to Rubio's or Chipotle restaurants it has observed in other parts of San Francisco, both of which were licensed for alcoholic beverages.

This site was licensed from 2013 to 2014 with another type 41 license, held by a business called "The Melt" that focused on grilled cheese sandwiches. That business closed in 2014, and its license was ultimately canceled for non-payment of license renewal fees. There was neither any record of Department disciplinary action against that license nor any record of complaints to the Department regarding its operation.

The premises is properly zoned for the type of business activity appellant plans for the premises. The local governing body did not require a conditional use permit for this site.

There is one consideration point, as defined by section 23789 of the Business and Professions Code, within 600 feet of appellant's premises: the Mission Bay Child Development Center located at 152 Berry Street, San Francisco. It is located 550 feet

from appellant's premises. The Department sent the Center a notice to inform it of this application, but received no response.

Under the criteria set forth in Business and Professions Code section 23958.4(a)(2), the census tract that contains applicant's site permits 31 on-sale licenses before it is presumed to be over-concentrated. Currently, 47 on-sale licenses have been issued in that tract. Therefore, the premises is in a census tract that already has an undue concentration of on-sale licenses.

However, pursuant to Business and Professions Code section 23958.4(b)(1), the Department may nevertheless issue another on-sale eating place license if the applicant shows doing so will serve "public convenience and necessity." The Department's investigation concluded that appellant's premises would serve public convenience and necessity because other Mexican restaurants in the area provided tableside service and a higher-priced menu, while appellant's premises would offer "a family-friendly atmosphere" with less expensive food.

Numerous residences are located within 100 feet of appellant's premises. At 200 Townsend Street, units 1 through 50 are approximately 92 feet from appellant's premises. At 250 King Street, numerous residential units are on floors above appellant's premises. Out of all of those residential units, eighty-four protests were filed against issuance of the license.

Between June 5, 2015 and May 20, 2016, the Department made no less than six visits to the premises and the immediate surrounding area during various times of the day and night to observe the area and its conditions. During those visits, other than the ambient level of noise caused by vehicular traffic and foot traffic, the premises did not

appear to cause any noticeable added noise or be the site or source of any disorderly conduct, intoxicated persons, or undue litter.

Protestant Julie Poggetti-Zaoui, a 10-year resident at the Beacon complex, testified she opposes the application because there are too many alcoholic beverage licensees in the area already, including a liquor store across the street and at least one bar already in the Beacon complex. She added that appellant's premises is not a restaurant with waiter/waitress service and that patrons just order at the counter. She also observed a chronic problem with people who are transients and loitering in the area, including, but not limited to, at the McDonalds and a liquor store, both right across the street from appellant's premises.

The SFPD opposed the application because the site is in a high-crime area already over-concentrated with on-sale licensees and will create a nuisance. The premises is in an urban mixed-use neighborhood within a city block of AT&T Park. This area has a lot of persons who are homeless and loitering. This section of San Francisco demands added police services, resulting in many paid overtime hours for SFPD. Appellant promotes its very inexpensive food prices, which will promote added sales and service of alcoholic beverages. Further, it is feared patrons who buy alcoholic beverages will believe they can, as with their food at other Taco Bells, consume it off the licensed premises, resulting public consumption of alcoholic beverages on the adjacent streets and locales. SFPD believes the conditions appellant agreed to would be ineffective because (1) street patrol officers are often not aware the license conditions even exist; (2) the conditions are subject to change once the license is issued; and (3) the Department does not have a sufficient staff to promptly enforce the

conditions on their own and their enforcement will ultimately fall upon SFPD patrol officers. While SFPD is often able to resolve disputes over alcoholic beverage applications with the imposition of license conditions, after much analysis and discernment over this specific application, it remains opposed to issuance of the license.

Appellant's managing member and Taco Bell franchisee, Erich Moxley, and its project developer, S.G. Ellison, collectively testified that the "Taco Bell Cantina" is a novel concept, there being only one other located in Chicago, Illinois, operated by a different franchisee. The "cantina" concept is inspired by the casual beachside restaurants in Mexico where a patron can have a simple meal with beer or wine. While still providing lower-priced food items, appellant's premises space is designed to be more welcoming, having been upgraded with such features as "distressed wood," the installation of a large-screen television, plug-ins for computers and electronic devices, a glass-enclosed open-kitchen area, community-style dining tables, and a menu that includes "shareable dishes." Appellant asserts its interior premises layout and customer flow is similar to Rubio's or Chipotle restaurants where patrons order their food at the counter off the posted menu boards, see it prepared for them in the open kitchen, then pick it up at the other end of the counter. Appellant believes its business also fills a need as it is near AT&T Park, so it could serve those people going to and from the Park's baseball games, concerts, and other events, in addition to serving inexpensive food to employees of businesses in the area.

Appellant found this site after the prior business, known as "The Melt," which also had a beer and wine license, left the location.

Appellant met with the police and protestants on several occasions to fully discuss and provide information regarding the planned operation of appellant's premises.

Appellant specifically agreed to be bound by every term and condition in the Petition for Conditional License. Appellant also agreed with the landlord of the Beacon complex that appellant will clean up litter on some of the sidewalks adjacent to the premises.

Appellant planned to thoroughly train its staff regarding the responsible sales and service of alcoholic beverages. Appellant drafted a written alcoholic beverage service policy and a quiz that would be used to verify employees' knowledge of those policies. Appellant intended to use unique cups for alcoholic beverages so they could be easily discerned from soft drinks, to aid in keeping alcoholic beverages from leaving the premises and to help detect any improper consumption of alcoholic beverages on appellant's adjacent patio. Furthermore, beer and wine would not be served to patrons in bottles or cans. Beer and wine would first be poured into cups by appellant's employees and only then served to customers. Appellant estimated patrons would be charged approximately $6.00 to $7.00 per beer or wine-based sangria-type drink. Appellant would add staff, as needed, to make sure its employees could adequately monitor patrons in and around the premises, especially when there are major events nearby or at AT&T Park.

After the hearing, the Department issued its decision denying the license application.

Appellant then filed this appeal contending the Department erred in denying the license after finding that appellant had shown the premises served public convenience or necessity.[2]

DISCUSSION

Appellant contends the Department erred in denying the applied-for license. It argues there is not substantial evidence to support the conclusion that appellant's low-priced food will attract loiterers or panhandlers. (App.Br., at p. 8.) It further argues the Department failed to show good cause to deny the license. (*Id.* at p. 9.) Finally, it insists that a showing of public convenience or necessity is "intended to overcome the denial of a license in an area with undue concentration," and claims the Department decision disregards the finding of public convenience or necessity reached by "an experienced investigator." (*Id.* at pp. 11, 13.)

Additionally, appellant has submitted a Request for Judicial Notice of three documents: the minutes of a San Francisco Planning Commission meeting; an online news article; and a list of active Chipotle licenses in San Francisco. (See App. Request for Judicial Notice.) Appellant, however, merely lists and appends the documents, and offers no discussion of their relevance. (*Ibid.*)

As an initial matter, the Board cannot consider the additional documents submitted with appellant's Request for Judicial Notice. Ordinarily, this Board may only consider documents contained in the record on appeal, and "shall not receive any

2. This hearing was originally calendared for December 7, 2018, but was rescheduled upon oral motion by appellant.

evidence other than that contained in the record of the proceedings of the department." (Bus. & Prof. Code, § 23083.)

It is true that under certain limited circumstances this Board may consider evidence "which, in the exercise of reasonable diligence, could not have been produced . . . at the hearing before the department." (Bus. & Prof. Code, § 23084(e).) However, rule 198 provides the standard by which the Board may evaluate such evidence:

> When the board is requested to remand the case to the department for reconsideration upon the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the department, the party making such request must, in the form of a declaration or affidavit, set forth:
>
> (a) The substance of the newly-discovered evidence;
>
> (b) Its relevancy and that part of the record to which it pertains;
>
> (c) Names of witnesses to be produced and their expected testimony;
>
> (d) Nature of any exhibits to be introduced;
>
> (e) A detailed statement of the reasons why such evidence could not, with due diligence, have been discovered and produced at the hearing before the department. Merely cumulative evidence shall not constitute a valid ground for remand.

(Code Regs., tit. 4, § 198.)

Appellant does not explain the substance or relevance of the documents it submits. (See Code Regs., tit. 4, § 198(a) and (b).) Moreover, at least two of the documents—the San Francisco Planning Commission minutes and the list of Department-licensed Chipotle restaurants—were available at the time of the administrative hearing. The third document—an online news article—merely dramatizes information contained in the Planning Commission minutes. Appellant does not explain

why it was unable to produce these documents in evidence at the time of the administrative hearing. (See Code Regs., tit. 4, § 198(e).) Appellant merely cites a provision of the Evidence Code referring to judicial notice, without an explanation as to how that provision applies to these documents—or how, for that matter, these documents constitute anything other than evidence outside the record. (See generally App. Request for Judicial Notice, citing Evid. Code, § 452.) We therefore deny appellant's Request for Judicial Notice and disregard the documents therein.

We turn, then, to the question of whether substantial evidence exists in the record to support denial of the applied-for license despite a finding of public convenience or necessity.

The California Constitution states, in relevant part, that "[t]he department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine *for good cause* that the granting or continuance of such license would be contrary to public welfare or morals." (Cal. Const., art. XX, § 22, emphasis added.)

However,

> the discretion to be exercised by the department under section 22 of Article XX of the Constitution "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke [or deny] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare or morals."

(*Martin v. Alcoholic Bev. Control Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513], quoting *Weiss v. State Bd. of Equalization* (1953) 40 Cal.2d 772, 775 [256 P.2d 1].) "[T]he Department's role in evaluating an application for a license to sell alcoholic

beverages is to assure that the public welfare and morals are preserved 'from probable impairment in the future.'" (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 7 Cal.3d 433, 441 [102 Cal.Rptr. 857], quoting *Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 119 [28 Cal.Rptr. 74].)

The Constitution grants this Board jurisdiction to review whether a license denial "is supported by the findings, and whether the findings are supported by substantial evidence in light of the whole record." (*Ibid.*; see also Bus. & Prof. Code, § 23084(c) and (d).)

Section 23958 provides that the Department "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" (Bus. & Prof. Code, § 23958.) Section 23958.4, in turn, provides a limited exception to mandatory denial:

> (b) Notwithstanding Section 23958, the department may issue a license as follows:
>
> (1) With respect to a . . . retail on-sale bona fide eating place license . . . if the applicant shows that public convenience or necessity would be served by the issuance.

(Bus. & Prof. Code, § 23958.4(b)(1).)

In this case, it is undisputed that appellant's premises is situated in a census tract with an overconcentration of licenses, and that the area suffers from high crime. (See generally App.Br.; see also Findings of Fact, ¶¶ 8-9.) The Department investigator, however, found that the applied-for license served public convenience and necessity.

(See Exh. 2, at p. 4.) She listed the seven other on-sale licenses within 1000 feet of appellant's premises and wrote:

> Based on my investigations, the subject license will serve Public Convenience or Necessity. The two other Mexican Restaurants listed above differ from applicant's premises in that they provide table/waiter service, including higher priced menu items and weekend brunches. Subject premises offers Mexican cuisine that will be in a family-friendly atmosphere with comfortable dining and a less expensive food menu.

(*Ibid.*)

The ALJ acknowledged the investigator's conclusion regarding public convenience and necessity in his findings of fact. (See Findings of Fact, ¶ 9.) In his conclusions of law, he wrote:

> Under section 23958.4(b)(1), even if issuance of a license will create or add to an undue concentration of licenses, the Department may still issue another license if an applicant shows that ". . . public convenience or necessity would be served by the issuance." In this case, the Department's investigation concluded "public convenience or necessity" would be served because of the casual family-friendly dining atmosphere of the premises in conjunction with its lower priced food options, especially compared to other Type 41 licensees within 1,000 feet of Applicant's premises, only two of which offered Mexican food.

(Conclusions of Law, ¶ 8.)

Despite this showing of public convenience or necessity, the ALJ nevertheless denied the license. He wrote:

> 9. It is determined that, under the circumstances of this case, Applicant's showing of "public convenience or necessity" does not warrant the Department exercising its discretion to issue yet another on-sale eating place license in this census tract. Firstly, section 23958 states that "The Department ***shall deny an application*** 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." (emphasis added) Section 23958.4(b) clearly states the Department "***may***" still issue another license if an applicant shows

". . . that public convenience or necessity would be served by the issuance." (emphasis added) However, even if an applicant makes a "public convenience or necessity" showing, the statute does not compel the Department to issue the license added license and it can still exercise its sound discretion in declining to do so. If that were not the case, then any "public convenience or necessity" showing, no matter how slight, incidental, or obscure would result in issuance of added licenses.

10. There are sound reasons to deny the pending application. Firstly, under the criteria set forth in section 23958.4, Applicant's census tract is permitted 31 on-sale licenses and the Department has already issued 47 licenses, or 165%, of the permitted on-sale licenses. There are already no less than 7 on-sale bona fide eating places within 1,000 feet of Applicant's premises. At least two of those do serve Mexican food, apparently at some unspecified higher price points than Applicant's food offerings. Also, the crime rate in Applicant's police reporting district is already 240% of the average, well above the 120% statutory threshold defining a high crime area set out in section 23958.4(a)(1). From May 2015 to May 2016 there were 979 calls for police service within 500 feet of Applicant's site. (Exhibit A-2) In the prior year, from May 2014 to 2015, there were 863 calls for police service within 500 feet of Applicant's premises. (Exhibit A-3) While the logs of police calls did reflect relatively few calls for public intoxication, still, the area around the premises demanded added police services causing a further drain on police resources and costing hours of overtime pay for police officers. Lastly, there is an existing problem with persons who are homeless and transients in the area, even as close as across the street at a nearby McDonald's and liquor store.

11. Applicant designed this novel Taco Bell Cantina facility to be, at least in its assessment, more family-friendly and conducive for casual dining. It offers a variety of food items, specials, or combinations spanning from $1.00 to $17.00+. Apparently, its food prices are less expensive than other Mexican restaurants in the area. It would cater to local residents, workers, and even those going to and from AT & T Park baseball games and other events held there. To that extent, the availability of alcoholic beverages at Applicant's premises could, as Applicant contends, serve some degree of "public convenience or necessity". However, even if that was the case, such a finding does not compel the Department to issue the added license. In this instance, whatever marginal "public convenience or necessity" that might be provided does not outweigh the presumptive denial of the application under section

> 23958 and 23958.4, especially where, as here, the Department would add a license into a census tract well over-concentrated with on-sale licensees, where the premises is also in a very high crime reporting district, and where there has been a substantial amount of law enforcement activity over the past two years within a 500 foot radius of the applied for license.

(Conclusions of Law, ¶¶ 10-11, emphasis in original.) The ALJ then found that there were no concerns regarding noise or litter, and that operation of the premises would not interfere with nearby residents' quiet enjoyment. (Conclusions of Law ¶¶ 12-14.) However, he went on to conclude that

> Sufficient evidence established that issuance of the license would tend to aggravate a loitering, homeless person, or transient problem in the area. SFPD and Protestant Poggetti, a 10 year resident of the Beacon development, established there already is a problem with transients and people who are homeless in the neighborhood of Applicant's premises, including at a McDonald's restaurant and liquor store right across the street from Applicant's site. (Exhibit A-1E) Further, Applicant sells individual food items for as low as $1.00. These would be very attractive to those homeless persons/transients who would not likely be able to obtain hot food items at that low a price anywhere else, except maybe the McDonalds across the street. Thus, they would likely be drawn to Applicant's facility over higher priced restaurants in the area. Once they made their $1.00 purchase, they would have to be treated as any other paying guests, and then their duration of stay at or about the premises, welcome or not, may become problematic. At what point would a paying guest evolve into an unwelcome loiterer? Further, the low priced food items will also likely make Applicant's premises more attractive for the pan-handling of its customers. Into this high crime area, that already has 165% of the permitted number of on-sale licenses, it would be unsound to add yet another on-sale license to further aggravate the existing loitering/homeless person/transient problem.

(Conclusions of Law, ¶ 15.)

The denial of appellant's license application reflected an exercise of the Department's discretion, pursuant to the permissive language of section 23958.4, subdivision (b)(1). In support of this exercise of discretion, the ALJ relies on two factors:

first, that the undue concentration of licenses[3] in the area outweighs the value of the appellant's "marginal" public convenience or necessity showing (Conclusions of Law, ¶¶ 9-11), and second, that the applied-for license would aggravate loitering, homelessness, and transience in the area (Conclusions of Law, ¶ 15).

As courts have noted, the discretion afforded the Department to deny a license is not absolute. (See, e.g., *Martin*, *supra*, at p. 876.) The Department may only deny a license for "good cause," indicating that its exercise of discretion must be based on sufficient evidence. (*Ibid.*)

We find no fault with the undisputed conclusion that applicant's premises are situated in an area of undue concentration. The ALJ's conclusion that these facts outweigh applicant's showing of public convenience or necessity, however, is arbitrary and unsupported by the evidence. Moreover, the ALJ's conclusion that issuance of the applied-for license would aggravate loitering, homelessness, or transience in the area is purely speculative, and is therefore insufficient to support denial of the appellant's license.

With regard to undue concentration, the ALJ reviewed the public convenience and necessity served by the proposed license. He observed that appellant designed its Cantina concept "to be, at least in its assessment, more family-friendly and conducive for casual dining." (Conclusions of Law, ¶ 11.) He noted that "[a]pparently" its prices were lower than other Mexican restaurants in the area, and would cater to local

3. "Undue concentration" describes both the level of crime in the reporting district (Bus. & Prof. Code, § 23958.4(a)(1)) and the number of licenses in the census tract (Bus. & Prof. Code, § 23958.4(a)(2)).

residents, workers, and attendees at AT&T Park events. (*Ibid.*) He confirmed that "[t]o that extent, the availability of alcoholic beverages at Applicant's premises could, as Applicant contends, serve some degree of 'public convenience or necessity.'" (*Ibid.*)

He went on to conclude, however, that "[i]n this instance, whatever marginal 'public convenience or necessity' that might be provided does not outweigh the presumptive denial of the application under section 23958 and 23958.4." (*Ibid.*)

The ALJ's conclusion that the public convenience or necessity shown was merely "marginal" and therefore could not outweigh undue concentration in the area is, without some support in evidence, precisely the kind of arbitrary exercise of discretion the law prohibits. (See *Martin*, *supra*, at p. 876.)

Moreover, the ALJ relies on pure speculation for evidentiary support. He concludes that "issuance of the applied-for license would tend to aggravate a loitering, homeless person, or transient problem in the area." (Conclusions of Law, ¶ 15.) For support, he cites testimony from Julie Poggetti stating that "there already is a problem with transients and people who are homeless in the neighborhood of Applicant's premises, including at a McDonald's restaurant and liquor store right across the street from Applicant's site." (*Ibid.*) The mere presence of transients at other premises, however, does not support the conclusion that *appellant's* premises would aggravate the issue of homelessness in the area.

To make that leap in reasoning, the ALJ relies on speculation that appellant's low priced food will "likely" draw transients as customers, and that their presence—even as paying customers—might "become problematic." (Conclusions of Law, ¶ 15.)

That speculation is belied by the evidence. Department Investigator Bernardino, in addressing the protestants' contention that the applied-for license would encourage disorderly activity, found the issue unsubstantiated. (Exh. 2, Report on Application for License, at p. 9.) She wrote:

> Protestants stated that licensing the applied-for premises would create public nuisance such as loitering and disorderly conduct such as yelling by drunks and intoxicated altercations. There will be an increase in homelessness and crimes.
>
> The premises is in the area of a mixed residential and commercial buildings. Many small and large businesses such as retail stores, restaurants, and offices are along 3rd Street.
>
> On June 5, 2015 at approximately 10:30 a.m. to 11:00 a.m., I visited the premises and observed normal street noise such as foot traffic, vehicular traffic, noise from incoming buses and delivery truck along 3rd Street.
>
> On November 20, 2015, at approximately 10:00 a.m. to 10:45 a.m., I visited the premises again to conduct a final inspection and again I observed normal street noise such as foot traffic, vehicular traffic, noise from incoming buses and delivery trucks along 3rd Street.
>
> I did not observe any disorderly conduct at the applied-for premises.
>
> On January 7, 2016, at approximately 10:45 p.m. to 11:25 p.m., Department Agent Daniel Louie visited the premises. Agent Louie did not observe any disorderly activity at the applied-for premises, no loitering, noise, or litter. There were approximately 7-9 orderly patrons coming and going to and from the applied-for premises.
>
> On January 8, 2016, shortly after midnight, Agent Louie visited the applied-for premises again and the business was closed. The area was quiet with no foot traffic.

(*Id.* at p. 8.) She further noted that despite the apparent lack of disorderly conduct such as loitering in the area, the applicant had agreed to license conditions "to address any potential problems." (*Id.* at p. 9.) Appellant was already selling low-priced food at the time of Bernardino's investigation. The conclusion that appellant's low-priced food will

attract transients and loiterers is therefore undermined by Investigator Bernardino's report.

Testimony from other witnesses further shows that the ALJ's conclusion is speculative. Respondent Poggetti, for example, testified that she couldn't recall whether she had seen any transients near the Cantina in the months since it opened for business, although she clearly recalled seeing them at the nearby liquor store and McDonald's. (RT, May 25, 2016, at p. 130.) Again, during that period of business, the Cantina sold food at its customary low prices, but did not attract transients to the best of Poggetti's recollection.[4] Poggetti's testimony therefore undermines the ALJ's purely speculative conclusion that transients would be drawn to the Cantina.

Similarly, Lieutenant Falzon's testimony centered on speculation regarding the Cantina's low prices. Asked on direct how the Cantina's license, if issued, would add to homelessness in the area, Falzon responded, "Well, I think going back to my earlier comments, Taco Bell Cantina and Golden Gate Bell's marketing is such that their customer base has an expectation for very inexpensive food, and I suspect that the same would apply to beverage." (RT, May 25, 2016, at p. 147.) Falzon merely voiced a suspicion that the Cantina's low food prices might translate into low prices for liquor as

4. In fact, Poggetti admitted during cross-examination that her objections weren't focused on appellant's application for a liquor license per se, but rather the presence of the Cantina in any form. She stated that her concerns were "not necessarily germane to the alcohol license, but just that they [the Cantina] were there at all. It was—I'm not happy that a commercial association leased that space to them, but the liquor license feels like it's in addition to that." (RT, May 25, 2016, at p. 132.) Later, she repeated her general objections to the Cantina as a business: "It feels like it's a fast-food restaurant, and it doesn't feel like it fits with The Beacon, with what's there as, you know, retail within the building." (*Id.* at p. 133.)

well. Later, he admitted that while the Cantina's food prices were cheaper than surrounding restaurants, he knew the Cantina intended to charge "either 5 to 7 or $7 to $9 range" for alcoholic beverages—a price he also admitted was consistent with other establishments in the area. (RT, May 25, 2016, at p. 163.) Eventually, he confessed he simply didn't believe appellant's business plan over his own suspicions:

> So simply put, I'm being presented with a business plan that says we're going to sell high-end beers and wines. We're going to have Anchor Steam, and all these fine products, yet we're selling 99 cent tacos.
>
> I believe what's going to happen is the day after this license issues, we're going to see 16-ounce Pabst Blue Ribbon.

(RT, May 25, 2016, at p. 188; see also *id.* at p. 190 [stating that "the day this license issues, they will have the [malt beverage] Slurpee machines delivered"].)

There is, however, no evidence to support Lieutenant Falzon's belief that appellants intend to backtrack on their business plan and instead sell bottom-shelf beer. Suspicions are not evidence; they are speculation, and cannot support findings or conclusions of law.

In fact, Lieutenant Falzon's testimony centered almost entirely on speculative conclusions regarding the Cantina's novel business model. On direct, the following exchange took place:

> [BY MS. WAGNER:] [W]hat was it about the issuance of [the] liquor license that caused you concern in connection with creating or adding to a law enforcement problem?
>
> [LT. FALZON:] Well, we're dealing with an absolutely untested business model in a city that has a density of 4,600 liquor licenses in 47 square miles. . . . An untested business model where their decades of marketing has set up an expectation with their customers that you can walk in and say, "let me get a number two meal with a drink to go," or just with a drink, and then you would turn and walk out the door. And time and again, and I

> got to tell you—I don't want to go off point, but I like these people. This isn't personal, but their business plan, from the police department point of view, from my decades of experience, was flawed.
>
> They could not articulate to me a meaningful way other than basically telling me they were going to put a bouncer at the door to stop every customer, and I've never seen fast food operate that way. And I couldn't understand from a practical point of view why that wouldn't create huge confusion, which confusion to me often interprets to calls for police services, confrontation, potential ambulance calls.

(RT, May 25, 2016, at pp. 149-150.) The gist of Lieutenant Falzon's testimony, then, is that because the Cantina's business model is purportedly new, it might be confusing, and confusion "often" results in a need for police services.[5] Again, this is pure speculation.

In *Marmalade Max*, the court of appeal interpreted a prior version of section 23958. (See generally *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Marmalade Max*) (1981) 122 Cal.App.3d 549 [175 Cal.Rptr. 342].) At the time, section 23958 contained permissive language allowing the Department to deny a license if issuance would create a law enforcement problem or contribute to an undue concentration of licenses. (Former Bus. & Prof. Code, § 23958, amended by Stats. 1980, ch. 1194, p. 4033.) In its effect, this permissive language is similar to the present section 23958.4: under the former section 23958, the Department had discretion to deny for undue concentration, while under section 23958.4, the Department has

5. Lieutenant Falzon also expressed a categorical lack of faith in license conditions, including conditions imposed on appellant's Petition for Conditional License. Regarding license conditions generally, he stated, "[A]t the end of the day, it is a piece of paper, and I don't understand how we all think some single or two-page piece of paper is going to prevent loitering and all the other topics that are coming up." (RT, May 25, 2016, at p. 152.)

discretion to grant a license *despite* undue concentration, provided the applicant shows public convenience or necessity. (Compare former Bus & Prof. Code, § 23958 with Bus. & Prof. Code, § 23958.4.) *Marmalade Max* therefore offers guidance as to the limits of the Department's discretion.

In that case, there was testimony as to "some police problems" at the applicant premises, but since the applicant sought to change the nature of the business, there was also "substantial conflict . . . as to the effect of granting the license." (*Marmalade Max*, *supra*, at p. 553.) Among other measures, the applicant would continue to employ security guards, but would also hire additional bouncers and reduce premises occupancy by half. (*Id.* at pp. 553-554.)

Testimony from local police predicted law enforcement problems, however:

> Police Chief James A. Hall testified that police problems had arisen at licensed establishments in the city that featured music favored by "younger people." Such "loud, young" music, he said, "seems to draw the people there that loiter and drink and get involved in other illegal activity," such as drunk driving and fights. Captain Robert Leighty agreed that the type of music played at an establishment "has a lot to do with the type of person it attracts." Officer Rockholm testified that 17 to 20 year olds tended to congregate around and try to enter licensed establishments that feature music. Sergeant Fancher testified that, in his experience, anywhere an establishment begins to serve alcoholic beverages, the incidence of fighting and drunk driving increases. Officer Hughes indicated that bars at which "loud rock music" was played required a disproportionate number of police responses.

(*Id.* at p. 554.)

The Department concluded it was "reasonable to infer . . . that, despite efforts of the [real parties'] security force, disturbances sometimes would occur when several hundred young persons would gather together in the described surroundings." (*Id.* at p. 554.)

This Board reversed the Department. The court of appeal agreed with the Board, holding that "the department's reliance upon a finding that 'disturbances' (of undetermined severity) would 'sometimes' (in the indefinite future) occur reflects altogether 'too sweeping' a view of what constitutes 'good cause' to deny a license." (*Id.* at pp. 556-557; see also *Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 255 Cal.App.2d 40, 48 [62 Cal.Rptr.778] [also interpreting former § 23958 and finding "speculative and conjectural" witness opinions insufficient to support Department's exercise of discretion].)

In this case, the ALJ's conclusion that "issuance of the license would tend to aggravate a loitering, homeless person, or transient problem" due to its low-priced food is supported only by speculation. (Conclusions of Law, ¶ 15.) The premises have been in operation since the fall of 2015 without an alcoholic beverage license, and there is no evidence that the premises' existing low-priced food options have aggravated loitering or vagrancy issues. Nor is there evidence to support Lieutenant Falzon's belief that appellants intend to serve low-priced alcohol to match their food prices. The only evidence consists of suspicions and possibilities, and these are insufficient to support the Department's exercise of its discretion.

We are left, then, with only the ALJ's conclusion that "[i]n this instance, whatever marginal 'public convenience or necessity' that might be provided does not outweigh the presumptive denial of the application" in light of the crime rate and number of existing licenses. (Conclusions of Law, ¶ 11.) As noted, the Department may not act arbitrarily in exercising its discretion. (*Martin*, *supra*, at p. 876.) To label the appellant's showing of

public convenience or necessity "marginal" and then discount it with pure speculation is the very definition of arbitrary. We therefore reverse and order the license issued.

ORDER

The decision of the Department is reversed.[6]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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 of said code.

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