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STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

CERTIFICATE OF DECISION

RECEIVED

APR 12 2010

Dept of Alcoholic Beverage Control
Southern Division

FILE : 47 - 463116

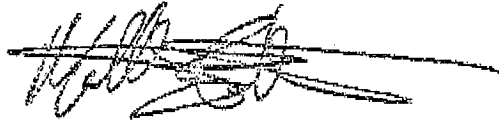
REG. : 09071531

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on April 8, 2010.

THIS DECISION SHALL BECOME OPERATIVE MAY 24, 2010.

Sacramento, California

Dated: April 8, 2010



Matthew D. Botting
General Counsel

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9 of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capital Mall, Suite 1245, Sacramento, CA 95814.

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

IN THE MATTER OF THE PETITION OF:

Il Boccaccio Inc.
Dba: Il Boccaccio
39 Pier Avenue
Hermosa Beach, CA 90254

} FILE: 47-463116
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FOR A PERSON-TO-PERSON TRANSFER OF AN
ALCOHOL LICENSE WITH NO ADDITIONAL
LICENSE CONDITIONS:

PROPOSED DECISION

Administrative Law Judge Jonathon E. Logan heard this matter at Cerritos, California, on January 27, 2010.

David Sakamoto, Staff Counsel, represented the Department of Alcoholic Beverage Control [Department].

Richard D. Warren, Attorney at Law, represented Il Boccaccio Incorporated.

Applicant Il Boccaccio submitted a transfer of license application for the licensed premises at 39 Pier Avenue, City of Hermosa Beach. The applicant accepted conditions specified on the existing license. The Department imposed two additional conditions at the request of the Hermosa Beach Police Department, to wit:

1. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours [of] 6:00 am to 12:00 midnight each day of the week,
2. The quarterly gross sales of alcoholic beverages shall not exceed the gross sales of food during the same period.

Applicant Il Boccaccio refused to sign the Petition for Conditional license with the added conditions and petitioned the Department for their removal. The matter was set for hearing. Oral and documentary evidence was received at the hearing and the matter was argued on January 27, 2010. Briefs from the parties were requested addressing the issue of the authority of the Department to impose conditions on a person-to-person transfer of an alcohol license.

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Alcoholic Beverage Control
Legal Unit

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ISSUES

The issues to be determined are:

Whether the Department acted properly under Section 23800(e)(1) when two conditions were imposed for the stated purpose of "mitigating existing law enforcement problems at the premises or in its immediate vicinity;

Did the Hermosa Beach Police Department provide the Department with "substantial evidence of an identifiable problem which exists at the premises or its immediate vicinity;

Would the transfer of the license with existing conditions be contrary to public welfare or morals;

Additionally, the Department in its "Statement of Issues" attached to the requested Petition for Conditional License, stated:

1. "Whether the Department acted properly under sec. 23800(e)(1) when it adopted and imposed two new added (sic) conditions upon the above captioned license, as set forth in the Petition for Conditional License, ... in that such conditions were reasonable to address and mitigate problems with respect to the premise or in the immediate area of the premises, in that there exists in the immediate area of the premises numerous on sale and off sale licensees and that in the late night and early morning hours there exists a law enforcement problem, and such problem was identified by local governing body or its designed (sic) [designated] subordinate officer or agency, to wit: the Hermosa Beach Police Department and that the existence of such problems at the premises or in the immediate area of the premises was supported by substantial evidence." (People's Exhibit 1).

FINDINGS OF FACT

1. An application for a 'person-to-person' transfer was received by the Department of Alcoholic Beverage Control [Department] during January 2008. The application lists "Il Boccaccio" as the applicant and Carla and Joseph Venezia as the current license holder and transferor.

★ 2. The location has been open and operating with a type 41 license (On-Sale Beer & Wine Eating Place) since 1994 under the name of the transferor, Venezia.

3. Department Representative Cynthia Ibarra testified she has been with the Department 25 years and was assigned to investigate the application for the person-to-person transfer. The transferor (Venezia) would retain 49% ownership of the location and Gregory and Lisa Newman would assume a controlling interest of 51%. Conditions on the Venezia license would be carried forward and applied to the Newman license. (Exhibit 5).

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4. On Exhibit 2, a form known as ABC-257, the representative noted the intended hours of operation are listed as closing at 1:30 am, each day of the week. The form was completed and submitted on January 31, 2008 by applicant Gregory Newman. She also indicated that in her 25 years with the Department, she has never processed a person-to-person application where additional conditions were imposed.

5. Representative Ibarra received a letter dated February 11, 2008 from the City of Hermosa Beach Chief of Police opposing the transfer of the license from one person to another person unless new conditions were added. (Exhibit A).

Petitioner's Exhibit 'A' continued stating -- "Under the current license, there are no hours defined, however the City CUP indicates a closing time of 1:30 am. As I mentioned the business is not open beyond midnight and often closed by 11pm".

"It is my understanding it is the responsibility of the ABC to control the over-concentration of establishments by applying conditions."

6. In response to concerns of the Police Department, and based upon a "calls for service" log, (Department's Exhibit 7), two conditions were added which required sales and service of alcoholic beverages to cease at midnight, each day of the week, and a condition which requires that the gross sales of alcoholic beverages shall not exceed gross sales of food, termed a "50-50" condition.

7. The Department presented evidence from Hermosa Beach Chief of Police that 39 Pier Avenue is located within Pier Plaza, described as a dead end street where the Hermosa Beach Pier meets the ocean. It is closed to vehicular traffic and has licensed premises, shops and restaurants on each side of the closed off street comprising the plaza.

8. The Pier Plaza area is well known as a gathering place for young adults, college students and has a history of problems such as fights, drinking and public urination. As a result, the police department has assigned four officers full time to maintain safety in the plaza area and to keep the peace.

9. Most of the problems associated with Pier Plaza occur in the evening hours, peaking between 10:00 pm and midnight, continuing until 2:00 am. When the alcohol establishments close, patrons are released into the street.

10. The City Council selected a number of businesses on Pier Plaza and requested input from the police department ultimately identifying locations constituting a "drain on police resources." Two locations were subjected to an in depth review resulting in modification of their CUP. Il Boccaccio was not identified by the council as requiring special attention.

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11. The City Council ordered and funded a special deployment of officers to deal with Plaza issues, which included authorization of overtime pay.

12. Officers of the police department were educated regarding alcohol laws and Conditional Use Permit restrictions. Inspections of premises were conducted in addition to alcohol "stings" which resulted in an overall decrease in "calls for service" from the previous year. The Department witness testified that the calls were for law enforcement services "attributable to that address."

13. The Department witness explained the "calls for service" log, Exhibit 7 which includes dates from July 2007 through July of 2008. The types of calls and interpretation of abbreviations are contained in Exhibit 'C'.

During that time, 39 Pier Avenue had three calls for service:

August 19, 2007, a "Security Check"

May 16, 2008, a "Subject Stop" wherein a person was stopped and identity determined.

June 27, 2008, a "Code 6" where there were 40 customers in 39 Pier Avenue after the 1:30 am CUP closing condition.

14. According to the witness, Il Boccaccio was the source of very few calls-for-service and was the lowest of all licensed premises requiring police services on the Plaza.

15. Conditions were requested to be imposed because, according to the witness and Exhibit 'A', the current operator of Il Boccaccio had voluntarily been closing at midnight and added conditions would reverse the trend of having late night licensed locations. A transfer without added conditions would be the equivalent of "adding a late night licensed location."

16. The request for conditions was also occasioned by "the City of Hermosa Beach's stated intent to regulate any new uses or transfers of licenses..." (Exhibit "D").

17. Applicant Gregory Newman testified that he met with the police department representative and was told that "due to the changing atmosphere, as far as the city was concerned, any person-to-person transfer would be protested to close at midnight."

18. While the transfer of Il Boccaccio was pending, other locations in the Pier Plaza area submitted person-to-person applications for transfers. One location, "Sylvia's," did not contest the imposition of added conditions. No request for additional conditions from the city was made during the transfer process of "Boogaloo" or "Underground." They are allowed to remain open under their Conditional Use Permit until 1:30 or 2:00 am. Person-to-person transfers of licenses at "The Poop Deck" and "The Mermaid" did not trigger a request for additional conditions.

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19. An additional basis for restricting hours at Il Boccaccio upon transfer was testimony from the City that the location was already voluntarily closing at midnight. Exhibit B contains two letters informing transferor Venezia of CUP violations consisting of staying open past 1:30 am, dancing and interior layout changes. The letter further indicates a hearing will be scheduled regarding the violations with the possibility of revocation or modification of the CUP. The letters were sent during the transfer/application process. No evidence was presented that a hearing was conducted by the City to modify the hours of operation of Il Boccaccio.

CONCLUSIONS OF LAW

1. Article XX, Section 22 of the California Constitution delegates to the Department of Alcoholic Beverage Control the exclusive power to license the sale of alcoholic beverages in this State.

2. Section 23958 requires the Department to conduct an investigation in conjunction with a license transfer:

“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.”

3. Up to and until the time of hearing, the Department proceeded under the stated authority contained in Business and Professions Section 23800(e) and (e)(1). This authority is indicated as the basis for imposition of additional conditions on this person-to-person transfer as reflected in Exhibit 1, Notice of Denial, Statement of Issues and Petition for Conditional License. It is also stated in Exhibit 6, Petition for Conditional License signed by the Department Representative.

4. The Department's Representative also noted that Section 23800(e) served as a basis for imposing conditions in the ABC-220, Report on Application for License, Exhibit 8.

5. Department Counsel indicated at the hearing that a new investigation under 23800(e)(1) permits, at the time of a person-to-person transfer, the imposition of conditions at the request of the local governing body. It was also argued that in drafting Section 23800, the Legislature meant to include the authority to impose conditions on a person-to-person transfer because the fee for such a transfer is included in 24072 which is contained as a basis for conditions in Section 23800(e). In the alternative, the Department argued that Section 23800(a), (e) or (f) could be used to impose conditions on this person-to-person transfer.

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6. Section 23800(e) states in pertinent part: "(1) At the time of transfer of a license pursuant to Section 24071.1, 24071.2, or 24072 and upon written notice to the licensee, the department may adopt conditions that the department determines are reasonable pursuant to its investigation or that are requested the by the local governing body, or its designated subordinate officer or agency in whose jurisdiction the license is located. The request for conditions shall be supported by substantial evidence that the problems either on the premises or in the immediate vicinity identified by the local governing body or its designated subordinate officer or agency will be mitigated by the conditions."

7. In support of its position that conditions can be imposed on a transfer under 23800(a), the Department argues in its brief, that "it is clear this is an application because Il Boccaccio is **applying** to the Department for its approval in transferring the license...". However the mere fact of application does not trigger the authority to impose conditions. There must be grounds for a denial and the conditions requested must focus on alleviating the basis for that denial.

8. By its terms, Section 23800(e) applies to transfers conducted under Section 24071.1, transfer of 50 percent or more of shares of stock; 24071.2, Limited liability company ownership transfers; or 24072, a statute enabling the Department to collect a transfer fee, which includes *stated fees* for transfers of a "retail license from a licensee to another person..."

9. The Department argued that the legislative intent of 23800(e)(1) was meant to include person-to-person transfers and that no other construction makes sense. In support of that argument, the department indicates that because a fee is paid under 24072 on such transfer, and 23800(e)(1) includes transfers under 24072, the Department can impose conditions on this transfer.

10. While the Alcoholic Beverage Control Act must be taken as a whole and its statutes given unambiguous meaning, it cannot be stretched to include that which the legislature did not intend. Both Section 23800(a)(1) and 24072 are enabling statutes. One under Article 1.5 enables the Department to impose conditions upon a license under certain restricted circumstances. The other, under Article 5, authorizes the Department to collect a fee upon the transfer of a variety of licenses. The sections are separately chaptered, separately interpreted and the inclusion of a fee collection authority in one does not give authority to impose conditions under the other. The transfer of license before this forum is governed by a specific statute, 24070.1: "An on-sale license issued for a bona fide public eating place may be transferred from the licensee to another person, as provided in Section 24070, for a bona fide public eating place..." Section 23800(e) does not include transfers under 24070.

Imposition of conditions upon application for a transfer of license measurably affects privileges granted under the license such that, if the legislature had intended to convey that ability upon the Department, a convoluted "bootstrapping" of authority would not be necessary.

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11. The Appeals Board recognized the Department's authority to impose conditions on a license in *Beasor et al vs. Tavern On The Main*, AB-7792 (May 2002), when it reversed a Department's decision to impose conditions on a person-to-person transfer citing inadequate investigation;

"The authority of the Department to impose conditions on a license is set forth in Business and Professions Code § 23800. The test of reasonableness as set forth in §23800, subdivision (a), is that " .. if grounds exist for the denial of an application...and if the department finds that those grounds [the problem presented] may be removed by the imposition of those conditions... " the Department may grant the license subject to those conditions. Section 23801 states that the conditions " ...may cover any matter...which will protect the public welfare and morals...."

We therefore view the word "reasonable" as set forth in §23800 to mean reasonably related to resolution of the problem for which the condition was designed. Thus, there must be a nexus, defined as a "connection, tie, link," in other words, a reasonable connection between the problem sought to be eliminated, and the condition designed to eliminate the problem."

12. Department evidence from the City of Hermosa Beach indicated a "law enforcement" problem exists within the Pier Plaza commercial district. The City's solution, as adopted by the Department and delineated in Exhibit 'A,' is to impose conditions on the Il Boccaccio license transfer. Reliance by the City of Hermosa Beach upon the Department's ability to "control over-concentration" by imposing conditions is, in this case, misplaced. This transfer of license will not result in an increase in the number of on-sale licenses therefore "over-concentration" is not an issue.

13. Evidence showed that the Il Boccaccio location is the least of the law enforcement problems on Pier Plaza. Utilizing the Calls for Service Exhibit 7, the location with the most "calls for service" is Citibank at 81 Pier Plaza, a location that is likely closed during the 9:00 pm to 3:00 am time the calls were generated. Exhibit 7 provided little information as to what types of calls for law enforcement services were required at differing locations and whether any services can be directly attributed to any particular address or to patrons connected to a licensed location. While services are noted by individual address, it cannot be said in each case that the address generated the activity necessitating the service.

14. While there is a general "police problem" in the Pier Plaza area, a connection was not established between the conditions requested to be imposed on one particular location and its relationship to solving the general problem. Exhibit 7 is at best ambiguous and provides an insufficient basis for imposing conditions on Il Boccaccio.

15. Petitioner's Exhibit 'D' explains that the City of Hermosa Beach, "in keeping with the City of Hermosa Beach's stated intent to regulate any new uses or transfers of licenses, alcohol service should terminate at midnight." According to testimony, five other licensed locations

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were subject to transfers during the two year time period of the Il Boccaccio application. At four locations, the City of Hermosa Beach made no request of the Department for conditions. "Sylvia's" did not contest the conditions requested to be imposed through the Department by the City. While the City may have indicated that their stated intent is to regulate license transfers, in four instances they did not act in accordance with that intent.

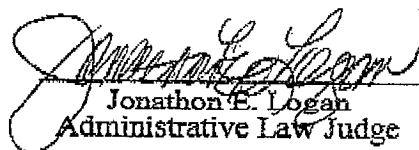
The contention that Il Boccaccio was "voluntarily" closing at midnight is neither relevant nor supported by substantial evidence.

ORDER

The Department's request to impose two new conditions on the transfer of a person-to-person license at the request of the City of Hermosa Beach Police Department is not supported by evidence adduced at the hearing. Accordingly, the request to impose conditions is denied.

Legal authority and attendant arguments submitted by the parties was reviewed and considered. Post hearing exhibits and declarations were not considered.

Dated: March 7, 2010


Jonathon E. Logan
Administrative Law Judge

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

IN THE MATTER OF THE PETITION OF:

Il Boccaccio Inc
Il Boccaccio
39 Pier Ave
Hermosa Beach, CA 90254-3733

FOR THE PERSON TO PERSON TRANSFER OF AN ON-SALE
GENERAL PUBLIC EATING PLACE LICENSE
WITH NO ADDITIONAL LICENSE CONDITIONS

FILE : 47 - 463116

REG. : 09071531

**DECLARATION OF
SERVICE BY MAIL**

under the Alcoholic Beverage Control Act.

The undersigned declares:

I am over eighteen years of age, and not a party to the within cause; my business address is 3927 Lennane Drive, Suite 100, Sacramento, California 95834. I served by **CERTIFIED** mail a copy of the following documents:

CERTIFICATE OF DECISION

on each of the following, by placing same in an envelope(s) addressed as follows:

Il Boccaccio Inc
703 Pier Ave, Ste B-815
Hermosa Beach, CA 90254

Carla M Venezia
Joseph James Venezia
39 Pier Ave
Hermosa Beach, CA 90254-3733


Richard D. Warren
929 Fresno Avenue
Berkeley, CA 94707-2304

David W. Sakamoto, Staff Counsel
Southern Division, Legal (Inter Office Mail)

Each said envelope was then, on April 8, 2010 sealed and deposited in the United States Mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 8, 2010 at Sacramento, California.



Declarant

☒ Lakewood District Office(interoffice mail)
☒ Division Office(interoffice mail)

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