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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

LOCAL CONTROL OF ALCOHOL BUSINESS

INTRODUCTION

At the September 3, 2002, meeting of the City Council, a member of the public questioned the number of liquor licenses issued to businesses in Pacific Beach. After Council discussion, the City Attorney's Office was directed to explain the law that governs liquor licensing to determine whether the law was being violated and, if so, to assess how the City could respond.

This Report describes how the City may control retail alcohol businesses through local zoning regulations and state licensing requirements. The Report will also explore what legal issues limit the City's action, what procedural steps the City has already taken, and what additional action, if any, the City can further pursue.

I

CITY OF SAN DIEGO ZONING REGULATIONS

Article 20, section 22 of the California Constitution gives the state exclusive authority to license and regulate the purchase and sale of alcoholic beverages. However, local governments may use their zoning authority to regulate alcohol businesses. Under state law, the Department of Alcoholic Beverage Control (ABC) may not issue a liquor license if it violates an existing, valid local zoning ordinance. Cal. Bus. & Prof. Code § 23790. Before a court upholds a zoning ordinance as valid, it must first find that the ordinance is reasonably related to the public welfare. *Arnel Development Co. v. City of Costa Mesa*, 126 Cal. App. 3d 330, 336 (1981). For businesses that sell alcohol, this means that zoning ordinances may impose conditions on the businesses, such as lighting requirements and limits on the hours of operation, that are intended to mitigate the negative effects from the land use. *Korean American Legal Advocacy Found. v. City of Los Angeles*, 23 Cal. App. 4th 376, 388-89 (1994). However, zoning ordinances may not completely ban businesses from selling alcohol in a jurisdiction, nor retroactively affect businesses that already sell alcohol legally. Cal. Bus. & Prof. Code § 23790.

In the San Diego Municipal Code [Code], zoning regulations distinguish between off-sale businesses, labeled “alcohol beverage outlets,” and on-sale businesses. Some off-sale businesses are permitted by right, but a Conditional Use Permit [CUP] is required in certain circumstances. Code section 141.0502 provides that a CUP is required in areas within or near a census tract where the crime rate exceeds the citywide average crime rate by more than 20 percent. A CUP is also required for alcohol beverage outlets in areas where operation of the outlet would tend to create a law enforcement problem, or where an undue concentration of alcohol businesses would result. San Diego Municipal Code §§ 141.0502(b)(1), 141.0502(c) Alcohol beverage outlets that are not in the above census areas may operate without a CUP provided they comply with the conditions in section 141.0502(b)(2), including signage, lighting and window visibility requirements. Section 141.0502(a) also exempts from CUP requirements certain limited types of alcohol beverage outlets, such as hotels and motels that do not devote more than ten percent of their floor area to the sale of alcohol for off-site consumption.

When the Code requires a CUP, the Police Department recommends for or against the proposed use and location of the alcoholic beverage outlet, and the CUP is decided in accordance with Process Three by a hearing officer with appeals to the Planning Commission. San Diego Municipal Code §§ 112.0505, 112.0506, 141.0502(c). The decision maker may include conditions to the CUP on entertainment, hours of operation, lighting, and security measures. *Id.*

For on-sale businesses, only bars or nightclubs greater than 5,000 square feet need a CUP. San Diego Municipal Code § 141.0614. All other on-sale businesses may operate by right provided they comply with the underlying zone and the state licensing restrictions outlined below.

The public's concerns regarding the proliferation of liquor licenses in the Pacific Beach area may be addressed by amending the Municipal Code to provide stricter zoning provisions for businesses selling alcohol. However, because the Code already extensively regulates off-sale businesses, future changes might instead focus on on-sale businesses. Such changes, for example, might include expanding the amount of businesses required to obtain a CUP. Businesses currently selling alcohol legally, however, may not be affected by these additional requirements.

II

STATE LICENSING REQUIREMENTS

In addition to zoning powers, the other way a local government may exercise control over an alcohol business is by its role in state licensing decisions. State law mandates that the ABC “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.” Cal Bus. & Prof. Code § 23958. Notwithstanding the initial requirement to reject a liquor license application because of undue concentration¹, the ABC may still issue a license if the “public convenience or necessity” would be served. Cal Bus. & Prof. Code § 23958.4.

The determination of “public convenience or necessity” is made by either the ABC or the local governing body, depending on the license type. The ABC makes the determination of public convenience or necessity for restaurants, hotels, motels, and other lodging establishments. While local agencies do not have the power to veto this determination, they may protest the ABC's decision to issue a particular license and receive a hearing before the ABC Board. Cal Bus. & Prof. Code § 24013. A court may also overturn a determination of public convenience or necessity if it finds the decision arbitrarily made or based on subjective factors. *Koss v. Alcoholic Beverage Control*, 215 Cal. App. 2d 489, 496 (1963).

Local governments make the determination of public convenience or necessity for any other license including off-sale licenses and bars. If the local agency makes the determination of public convenience or necessity, the ABC may issue the license despite the undue concentration. If, however, the local agency finds that the public convenience or necessity would not be served by issuance of the license, that by itself precludes issuance of the license. Therefore, in areas of undue concentration, the local government may prevent issuance of a liquor license for off-sale establishments and bars by making the determination that the public convenience or necessity would not be served by issuance of the license. However, if the local agency fails to make the public convenience or necessity determination within a 90-day period, the decision making authority is returned to the ABC.

State law also allows local agencies to delegate to a subordinate officer or body to make the public convenience or necessity determination. Cal. Bus. & Prof. Code § 23958.4. Previously

¹ “Undue concentration” is defined by California Business and Professions Code section 23958.4 as a case in which the applicant premises for an original or premises-to-premises transfer of any retail license is located in an area where any of the following conditions exist: “(1) The applicant premises are located in a crime reporting district that has a 20 percent greater number of reported crimes, ...than the average number of reported crimes as determined from the crime reporting districts within the jurisdiction of the local law enforcement agency. (2) As to on-sale retail license applications, the ratio of on-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of on-sale retail licenses to population in the county in which the applicant premises are located (3) As to off-sale retail license applications, the ratio of off-sale retail licenses to population in the census tract or census division in which the applicant premises are located exceeds the ratio of off-sale retail licenses to population in the county in which the applicant premises are located.”

in San Diego, Planning Development and Review decided whether a public convenience or necessity existed for bars and off sale businesses as part of the CUP process. In November 2000, by adoption of Resolution No. R-294124, the City Council delegated this authority to the Police Department. At the same time, the City Council established a procedure where the Chief of Police, or his or her designee, would consider whether evidence submitted by license applicants showed a public convenience or necessity would be served by issuance of the license. Among the criteria the Police Department must now consider is whether the license is for an existing business, whether the business is located within a 600 foot radius of churches, parks, or schools, whether the business, by way of merchandise or clientele, will serve a segment of the City's population not currently being served, and whether issuance of the license will promote the goals of the applicable land use plan. *Id.* The Police Department additionally considers the arrest and crime statistics within a .2 mile radius, and whether there are any existing police problems in the area resulting in a significant number of calls for service. The burden for identifying additional bases for finding public convenience and necessity lies with the applicant.

In practice, the Police Department only makes the public convenience and necessity determination in a small number of cases. In all other cases, the determination lies within the purview of the ABC. However, a recent change in state policy has weakened the ABC's incentive to deny or restrict liquor licenses, and instead caused the ABC to support the issuance of more licenses. As this change becomes more solidified, division between the ABC and the Police Department may intensify.

III

FUTURE ACTION

Our Office recommends a policy discussion of this issue at the Land Use and Housing Committee. Alternatively, the discussion could be held at the Public Safety and Neighborhood Services Committee.

Our Office also recommends that the City Manager be directed to work with the Police Department in monitoring determinations made by the ABC as it relates to issuance of liquor licenses, and to challenge the issuance of the liquor license if there is no rational basis for such a finding. The City should also consider adopting a policy that the public convenience and necessity would not be served by issuance of a liquor license for off-sale businesses and bars in areas of high crime or undue concentration based on any of the factors in Resolution No. 294124. Finally, the City should examine how it can strengthen its zoning laws for alcohol businesses.

CONCLUSION

The City may regulate alcohol businesses through its zoning ordinances and the state licensing regulations contained in the California Business and Professions Code. As for zoning, the San Diego Municipal Code currently requires CUPs for off-sale businesses in areas that meet the census and crime criteria set forth in section 142.0502, and for bars greater than 5,000 square feet. Other alcohol businesses may operate by right provided they comply with mandatory conditions in the Code, statewide licensing regulations, and are a use allowed by the underlying zoning for the area. Additional zoning regulations, such as requiring more alcohol businesses to obtain CUP's, may be possible if reasonably related to the public welfare. However, changes in local zoning requirements may not affect businesses currently operating legally.

State law also gives the City some influence in alcohol licensing decisions. First, the City may protest the ABC's decision to issue a particular liquor license, and is entitled to a public hearing before the ABC Board to articulate its protest. Also, the City may preclude the issuance of a license for an off-sale business or bar in an area of high crime or undue concentration by determining that the public convenience or necessity would not be served by issuance of the license. The City has recently delegated this authority to the Police Department and established a set of criteria to decide whether the public convenience or necessity exists. However, because the Police Department has few opportunities to make this determination, the ABC still controls many of the liquor licenses issued in San Diego.

Nonetheless, the City has no legal cause of action against the ABC at the present time. There is no evidence that the ABC is violating local zoning laws nor is there evidence showing that the ABC has determined public convenience or necessity arbitrarily.

Respectfully submitted,

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