

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

IN THE MATTER OF THE APPLICATION OF:

LADH, LLC
Dbas La Aroma de Havana
411 State St.
Santa Barbara, CA 93101-2304

FOR THE ISSUANCE OF AN ON-SALE BEER AND
WINE PUBLIC PREMISES LICENSE

File No.: 42-570538

Reg. No.: 17086173

**Precedential Decision
No.: 19-05-L**

**DESIGNATION OF DECISION AS PRECEDENTIAL UNDER
GOVERNMENT CODE SECTION 11426.60**

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated December 20, 2017, in the above-referenced action.

This decision is designated precedential effective November 22, 2019.

Sacramento, California

Dated: November 22, 2019

Jacob A. Appelsmith
Director

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DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on November 15, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on March 20, 2018, before Administrative Law Judge Matthew G. Ainley, and the written arguments of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to uphold its denial of the Applicant's application for a type-42 on-sale beer and wine for a public premises license. The Department denied the application because Applicant operates a smoke shop, and Labor Code section 6404.5 requires a "private smokers' lounge" to be dedicated to the use of tobacco products.

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 March 20, 2018.

FINDINGS OF FACT

1. The pending application was filed with the Department on June 16, 2016. It seeks issuance of a type 42, on-sale beer and wine public premises license for premises located at 411 State St., Santa Barbara, California (the Proposed Premises).
2. The Proposed Premises is a smoke shop and tobacco lounge. It has two lounge areas for smoking, a humidor, and cigar storage lockers.

3. The application was protested by three individuals.
4. The Department approved the application despite three protests and issued an interim operating permit with conditions. Two of the protestants withdrew based on the conditions imposed by the Department with the interim operating agreement.
5. The Department subsequently learned that Labor Code section 6404.4 requires a private smokers' lounge to be dedicated to the use of tobacco products. In the Department's opinion, this law prevented the issuance of an alcoholic beverage license to a smoke shop/tobacco lounge. Accordingly, the Department revoked the interim operating permit and changed its recommendation from approval to denial.
6. The applicant requested a hearing to contest this denial. The Department set the matter for hearing to address the Department's denial of Applicant's application and did not notice the remaining protestant.
7. At the hearing, the Department and the applicant indicated that the legal issue arising from the Labor Code should be determined first, with the protest issues being heard in a separate hearing if the denial was reversed.

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 23958¹ requires that the Department conduct a thorough investigation to determine, among other things, if the applicant and the Proposed 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 that 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 Proposed Premises do not qualify for a license under the Act. It further provides that the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4.
3. The evidence established that the Department completed its investigation. The evidence also established that, but for Labor Code section 6404.5, the Department believed that the

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

license should issue over the objection of the protestants. Because the protestants were not informed of this hearing, no evidence was presented relating to any of the protest issues.

4. The remaining protestant is not a real party in interest to an administrative hearing to determine whether an alcohol license should issue to the applicant. (*Coffin v. Alcoholic Beverage Control Appeals Board* (2006) 139 Cal. App.4th 471.) A protestant is analogous to a “complainant” in a criminal proceeding who can bring evidence for the Department to consider and raise the burden of proof on the applicant for the license to issue. (*Coffin, supra*, 139 Cal. App.4th at 478.) Government Code section 11500(b) provides that a “party” includes “the agency, the respondent, and any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding.”

5. The only issue in this case at this juncture is between the Department and the Applicant over the operation of California Labor Code section 6404.5. The protestant did not raise this issue; rather the Department denied this application as a matter of law. Moreover, while the Department regularly recognizes protestants as parties to a hearing on a protested application, in this case the remaining protestant has not been “allowed to appear or participate” at this stage of the proceeding. Therefore, the protestant was neither a party to, nor a necessary party for, this proceeding regarding the legal effect of Labor Code section 6404.5 upon the Applicant’s license request.

6. Labor Code section 6404.5(c) is a general rule that smoking tobacco products is prohibited in any place of employment or an enclosed place.

7. Labor Code section 6404.5(e) provides limited exceptions to the general rule:

(e) For purposes of this section, “place of employment” does not include any of the following:

...

(2) Retail or wholesale tobacco shops and private smokers’ lounges.
For purposes of this paragraph:

(A) “Private smokers’ lounge” means any enclosed area in or attached to a retail or wholesale tobacco shop that is dedicated to the use of tobacco products, including, but not limited to, cigars and pipes.

(B) “Retail or wholesale tobacco shop” means any business establishment, the main purpose of which is the sale of tobacco products, including, but not limited to, cigars, pipe tobacco, and smoking accessories.

8. The Attorney General issued an opinion that a private smokers' lounge or retail or wholesale tobacco shop could not serve alcoholic beverages to patrons under the above exception. (94 Ops.Cal.Atty.Gen 46.) While Attorney General Opinions are not controlling, they are entitled to great weight (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, Norman C. Deleuze* (2002) 100 Cal.App.4th 1066, 1075). In addition, this opinion reflects the Department's view that the Applicant's license should be denied.

9. Further, after the Attorney General's Opinion on this matter, the Legislature amended, among other smoking-related statutes, Labor Code section 6404.5(e) in 2016 (Senate Bill SBX2-5). In that Senate Bill, the enumerated exceptions were limited further, from 14 to 7, and the definition of "private smokers lounge" was not changed at all. This shows that the Legislature did not disagree with the above-referenced Opinion, and evidences the Legislature's intent that the exceptions should be narrowly tailored and strictly enforced.

10. Accordingly, Labor Code section 6404.5(c) prohibits the issuance of an ABC license to a "private smokers' lounge" because it would no longer be "dedicated" to the use of tobacco products.

ORDER

The Applicant's application for a type-42 on-sale beer and wine for a public premises license is denied.

Sacramento, California

Dated: November 26, 2018

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

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.