

## **HELP !**

### **What Can Be Done to Make Applying For a License Fair?**

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Applying for a new or original ABC license is so daunting that many legitimate, potentially successful businesses don't even try. Why bother? Some cities' zoning regulations and processes are so tough that a year or two can be taken just wrangling through the city system. And then there's the Public Convenience or Necessity requirement. That's the legislature's gift to municipalities that grants virtual veto power to cities in many ABC applications. And we haven't even reached the ABC application stage.

Picture this: one of the nation's finest chefs wants to come to the California food scene. He and his corporate financial partners are excited at the prospect of establishing a fine dining experience in the heart of Southern California's movie industry backyard. Or perhaps the Northern California bay area holy ground of wine and food. After obtaining the backing of city government and civic leaders, the restaurateur still must go through the city process for a year or so.

The process through the municipal zoning system can be even more difficult for the convenience store, supermarket, or grocery, large or small. But in this scenario, the restaurateur is spending money at a frightening clip. Assistant chefs are hired as is a management staff, and a wait crew. Promotions, menus, equipment, furnishings and the long term lease are draining resources. When does this place open? Wait. Who applied for an ABC license? How long does it take? Is it as simple as, say, getting a license to sell alcohol in a restaurant in Louisiana? Let's hope the ABC application was filed contemporaneously with the city zoning applications. But that's not our scenario. In our example, the application was filed a month ago. The 30 day posting is just coming down. Now, either there are protests or there aren't. If there are not protests filed, the ABC can conclude the investigator's report required by Business and Professions Code Section 23958 and issue the license. If there are protests....

Once a protest is filed, the Department is presently required to conduct a hearing before the license can be issued pursuant to section 24015. Even if the Department truly wants to issue the license, there must be a Hearing on Protest concluded first. After the hearing, the Administrative Law Judge issues a Proposed Decision, and the Department will certify the decision if it is acceptable to the Department. That certification usually follows around 60 days after the hearing is concluded. What if the protestant loses? Can that protestant appeal the decision under Business and Professions Code Section 23081? Of course. The appeal typically takes another eight to twelve months or even longer. In the meantime, no license? Yes and no.

In 1994 (effective January 1, 1995) the legislature created the Interim Retail Permit in Section 24044.5. The IRP is issued by the Department in 120 day periods within the Department's discretion if an application is protested and if the Department determines through its investigation that the license should be issued. That IRP can be the difference between success and failure since it allows the applicant an opportunity to open. There has been a hitch, perhaps until early this year. The Department has taken the position that in order to determine if there really are protests in order to make an applicant eligible for the IRP, the protests had to be verified. That process is in itself lengthy and time consuming.

If there are protests received by the Department, the ABC ships the protests up to Hearing and Legal up in Sacramento where an overworked clerical desk sends notices to those protestants requesting verifications to those protests. The verification is a statement that the allegations made in the protest are true or are true based on information and belief. It doesn't matter if the allegations really are true; the protest still has to be verified. The protestant is given 10 days to respond by signing and returning the verification. Waiting to see if protest verifications will be returned can be and has been a significant log jam. However, an innovative applicant working with the innovative folks at the LA/Metro District Office in Southern California with permission from Southern Division Headquarters early this year asked the question: Why wait for the verifications? The IRP statute doesn't say "Verified Protest;" it says "...has been protested...."

The Department convened a meeting in Sacramento early April to discuss the application nightmare. Senior ABC management was present, including newly appointed Director Jerry Jolly as were a number of industry leaders and consultants. This group discussed the concept of taking LA/Metro's innovative approach to IRP issuance, that is, not waiting for verifications to be returned before issuing an IPR. We concluded that this system should be employed statewide. There's more.

Ann Hall, Government Affairs, 7-11, is leading a legislative effort to further assist applicants. AB 2296, (Leno and Aghazarian) if passed during this legislative session, will allow the Department greater leeway in dismissing protests. Part of this proposed legislation may require that in order for a protest to go to hearing, the protestant must submit a written request. New Section 24015 would now read, in relevant part:

(b) Any person who has filed a timely verified protest that has been accepted pursuant to this article may request that the department conduct a hearing on the issue or issues raised in the protest. The request shall be in writing and shall be filed with the department within 15 calendar days of the date the department notifies the protesting party of its determination as required under subdivision (a).

The proposed legislation also provides:

(d) If a request for a hearing is filed with the department pursuant to subdivision (b), the department shall schedule a hearing on the protest. The issues to be determined at the hearing shall be limited to those issues raised in the protest or protests of the person or persons requesting the hearing.

(e) Notwithstanding that a hearing is held pursuant to subdivision (d), the protest or protests of any person or persons who did not request a hearing as authorized in this section shall be deemed withdrawn.

(f) If no request for a hearing is filed with the department pursuant to this section, any protest or protests shall be deemed withdrawn and the department may issue the license without any further proceeding.

One hopes that both the legislature and the Department would expend best efforts to assist beleaguered applicants. The process should not be so time consuming and so unwieldy that it discourages hopeful businesspersons who desire to license premises to the benefit of the community. Certainly, some licenses just shouldn't be issued. The Department is required to conduct an investigation and exercise its discretion to issue or not issue. There is a hearing process wherein an Administrative Law Judge hears evidence in support of and against licensure and then issues a proposed decision discussing all salient information and recommending issuance or denial. However, for the process to be fair, it cannot be so brutal as to discourage potential businesses from even beginning the application process.

Obviously there are safeguards for the legitimate protestant. For example, Rule 61.4 requires the Department to deny an application for premises within 100 feet of a residence unless the applicant can affirmatively establish that the operation of the business would not interfere with the quiet enjoyment of the property by the residents. Section 23958.4 requires a determination of public convenience or necessity by either the city (or county) or the ABC depending upon the type of license in question if there is an undue concentration of licenses in the census tract or if the proposed license is sited in a high crime reporting district.

There will always be friction between business and residence. There should be a legal forum for those conflicts to be aired. Today there are several opportunities for the issues to be discussed. Zoning regulations of municipalities and counties provide such a forum. The ABC Act provides for such a forum. Creating a repetition well known by the industry. An applicant usually gets to meet his or her or its protestants at several levels. But fair is fair. There must be a better balance between the legitimate interests of business and residential community. A protestant should not be empowered to hold our world renowned chef hostage as he attempts to bring that fine dining experience to California. The same holds true for the company that wants to open that supermarket really needed by the community; or the husband and wife who want to bring their small grocery to a neighborhood that so wants that corner building occupied by exactly that type of "mom and pop" enterprise; or the family whose life is dedicated to their cafe serving ethnic foods from their tradition and history. Legal assistance is nearly always needed, but let's hope the Department's new direction can give them a fighting chance to succeed.

Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."

