

# LOST IN THE APPLICATION MAZE

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## The Application

According to the Guinness Book of Records, The Dole Plantation on Oahu, Hawaii holds the world's largest Hedge Maze. Guinness Records was impressed by the complexity of the Dole Maze, but then Guinness Records never filed an ABC application. To get to the Dole Plantation, fly to Honolulu and take a taxi. To file an ABC application....Where do we begin?

The best place to start isn't even at your local ABC Office. It's at City Hall for the city where your premises are sited. Do you need a CUP? Do the statistics maintained by the ABC and the local police department dictate your need for a Public Convenience or Necessity Letter? In pursuing these municipal approvals, read my January 2003 *Beverage News* article. To pursue an ABC application, keep reading.

Let's make some assumptions. Let's assume that whatever municipal entitlements you need, you have. At the ABC District Office, you request and receive all the ABC application documents. The armload of application forms the clerk hands you must be filled out fully and accurately. Remember the signature lines on these documents state: Under Penalty of Perjury. Not disclosing your criminal record hoping that the Department won't learn about that methamphetamine manufacturing plea a few years ago

may develop into a problem. Sometimes a record won't disqualify an applicant, but false information in the form will.

You already know that part of the application process entails posting a notice. Business and Professions Code Section 23985 requires a Notice of Intention to be posted in a "conspicuous place at the entrance of the premises." Under Section 23985.5, no license can be issued until the Notice has been adequately posted 30 consecutive days. There are mailing and publication requirements for notifying neighbors, local law enforcement and the public.

The Department is required under Section 23958 to conduct a "thorough investigation to determine whether the applicant and the premises for which a license is applied qualify for a license...." Issues such as the proximity to residences and certain conflicting uses such as churches and hospitals within the immediate vicinity of the premises, and schools and playgrounds within 600 feet of the premises under Section 23789 explicitly authorize the Department to refuse a license. Denial under this statute is not mandatory. These other uses are consideration points that must be carefully reviewed by the Department investigator.

By statute license transfers in a sales/purchase of assets must go through an escrow. However, stock transfers of 50% or more of shares of a corporation instead of asset purchases constitute a transfer triggering ABC notification but are not required to go through escrow. The same process is provided for transfer of ownership of limited liability companies (See Sections 24071.1 and 24071.2).

Until the process is complete, the money the applicant is paying the seller stays in escrow. Until then, the premises are not licensed to the buyer/applicant. If this

business was not currently licensed, the Department does not have jurisdiction to issue a Temporary Permit.

Parenthetically, Temporary Permits are issued by the Department under Section 24045.5 entirely within the Department's discretion and only where the premises have been operated under a license within 30 days of the date of application for a Temporary Permit. The transfer must be person-to-person and not a premises-to-premises transfer. The permit is for period of 120 days but can be renewed by the Department upon request.

The good news at the end of the process could be the Department has no reason to deny the license and makes a positive recommendation to issue the license. Wise experienced counsel is invaluable to get to this point. In many cases where the Department recommends issuance of a license, you may qualify for an Interim Retail Permit under Section 24044.5 if your application is protested. The IRP is issued in 120 day increments solely in the Department's discretion and can help the applicant weather the protest for the duration of the protracted administrative and appellate maelstrom.

The bad news is that your application has been protested. By the way, if the Department decides to deny the application, it will send a Notice of Denial. You have 10 days to submit a "written petition for a license", and the Department will calendar the case for hearing a on the petition.

But who should apply? The sole proprietor of a two hundred square foot premises working the register by himself should apply. That's obvious. But how about the landlord who rents space to a restaurateur for \$100 a month and 95% of the gross sales of food and alcohol, or (worse) some percentage of the net profit of alcohol? Only

licensees should derive profit from the sales of alcohol (other than limited percentages of gross over rent or related fees). So anyone actually taking a healthy portion of the proceeds should be a licensee. That's the way the Department assures that Meyer Lansky and Charles Luciano don't secretly become de facto owners of a licensed premises. If Meyer and Lucky want to be licensees, they can't be hidden owners, they have to go through the application process.

### **The Protest**

During the time a protest could be filed, a protest was filed under Section 23013.

Under Section 24013, the Department may reject that protest, but only "if it determines that the protest was false, vexations, or without reasonable or probable cause...."

The Department gives great latitude to protestors and rejects protests rarely. If a protest is rejected, this statute gives the rejected protestor "10 days after issuance of the license to file an accusation with the department alleging the grounds of protest as a cause for revocation of the license...." The hearing on this "protest-accusation" may result in revocation of the license.

The Department will undoubtedly accept protests from the close-by resident, the fellow who lives miles away but owns the scary liquor store across the street, the neighborhood alcohol rehabilitation center, the police department, the retired librarian with way too much time on her hands, the local school, church pastor or hospital

administrator. A protest could be filed by the pedestrian walking by your 30-day notice and thinks, "I'll bet I could really screw up this process if I protest this place."

In a Hearing on Protest, the Department's recommendation is to issue the license. The burden of proof to demonstrate that the license should not issue is on the protestor. In a hearing on Protest, the ABC investigator typically testifies first in order to explain to the Administrative Law Judge the investigation and the reason for the recommendation. The Protestor can then call witnesses and introduce relevant evidence to support the position that the license should be denied. The Applicant then has the opportunity to call witnesses, submit evidence and testify. Any protestor who does not appear at the hearing will be deemed to have abandoned his or her protest.

If the Department recommends denial of the license requiring you as applicant to petition the Department for a hearing, you have the burden of proof to demonstrate to the Administrative Law Judge that the license should issue. The Department's recommendation for denial does not depend on protests being filed.

At this point your representative before the Department must have a strong working relationship. The Department's conclusion to issue the license is crucial.

The Department takes protests lodged by nearby residents very seriously. Rule 61.4 mandates the Department to deny "issuance of a retail license for premises-to-premises transfer for premises" which are "within 100 feet of a residence." The exception is where "operation of the business would not interfere with the quiet enjoyment of the property by residents."

The Appeals Board described and limited the Department's treatment of nearby residents in *Summit Energy v. Erazo and Department AB 7585* (2001), stating:

“The Department must, and should, take a broader view than any single protestant, and must draw upon its expertise when determining what may flow from the issuance of a license. If a Rule 61.4 protestant’s objection is treated as a veto, then any application for a license which could be granted with appropriate conditions would die stillborn.”

Dealing with the application maze of forms and information is difficult enough. Trying to figure out how to circumnavigate an administrative hearing on the application requires skill and experience.

Be advised that a hearing on an application case has every appearance of a court trial. Protestors are frequently represented by attorneys. The Department’s attorney is present to act on behalf of the Department’s interests. To closely paraphrase Abraham Lincoln, any applicant who shows up at a hearing acting as his/her own attorney has a fool for a client. The applicant without counsel may be the only one at the jousting tournament with neither lance nor armor.

**"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."**