

Conditional Use Permits and ABC Licenses

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In the beginning, the Department of Alcoholic Beverage Control actually controlled issuance of licenses for sale of alcoholic beverages. As anyone who has attempted to obtain a new ABC license for a market or restaurant in the last eighteen or so years could tell you: the ABC doesn't even enter the sport until late in the game. The ABC used to grant licenses within its discretion and based upon its rules. Then came Business & Professions Code Sec. 23790.

Innocuous enough, the 1982 statute simply says, in part: "No retail license shall be issued for any premises which are located in any territory where the exercise of the rights and privileges conferred by the license is contrary to a valid zoning ordinance of any county or city."

Therefore, before you can get an ABC license, you must appear at the municipal or county permit desk. This applies to all ABC applicants including Super Markets, gas stations with convenience stores, Art Museums and churches. A careful analysis is required to determine when you file with the ABC in relation to filing the CUP application. Most urban areas now have

detailed (even convoluted) Conditional Use Permit processes. It is crucial that the city's code be analyzed to ascertain whether a CUP is necessarily pursued as required before an ABC license can issue.

Frequently a perfectly qualified applicant just can't afford the time and money lost in the interminable delays occasioned by a city permitting process. Even if issued, some CUP grants are for a limited duration. For example there are CUP grants that expire six months after issuance. Some CUP's terminate upon the sale of the business or change in character.

Each city can have its own rules and procedures. Some cities require applicants to submit documents to City Planning for approval of a project. Some cities require informal review at staff level, then a hearing before a local area citizen group, then further formal hearing before a senior city official, then a possible appeal to an appointed commission and then possible review by the City Council itself. These are public hearings. Often, neighborhoods organize protests against the application. Schools and nearby religious institutions get involved. The process can take months or, at the worst, years. There may also be Superior Court review by Writ of Mandate to determine if there is substantial evidence supporting the city's conclusion to grant or deny that permit.

A coordinated team effort is required. We spend around 30% of law

firm time in these land use cases and work with architects, engineers, lobbyists and land use consultants.

Only after the “administrative” process through City Hall and “judicial” review if necessary can the applicant receive a license from the ABC, and then only if the applicant gets that CUP issued. Recall that the CUP and ABC applications may be filed contemporaneously. These cases take on the look of small political campaigns.

Had enough of municipal involvement? It gets worse. Effective 1995, Business & Professions Code Sec 23958.4 granted cities and counties veto power over issuance of some ABC licenses. Except for (mainly) hotels and restaurants, cities must affirmatively determine that public convenience or necessity would be served by issuance of that license where the premises are sited in a “high crime” area or where there was an “undue concentration” of licenses. The terms are defined by the statute to include a policing area that has a 20% higher crime rate than the rest of the city or county police districts; and to include a census tract where the ABC licenses issued meet or exceed the county license average. Either high crime or undue concentration will trigger the requirement of a Public Convenience or Necessity (PC/N) statement.

If you thought the CUP process was tough, keep reading. Some cities

require a public PC/N hearing before the City Council. Some city councils have delegated authority on determining PC/N to one designated police officer. You as applicant hope that officer has read the statute and the city rules and doesn't hate you for some unknown reason. That hope isn't always realized. For example, there was one city where the PC/N cop denied the PC/N letter to the ABC because there was an undue concentration of licenses, and the intended premises were in a high crime area. But that makes no sense, because the statute says that those are the reasons why the PC/N letter is needed in the first place. In that particular case, this author won a reversal of that denial before a city hearing officer on appeal, and the City Council declined the officer's request for further hearing before the Council.

An applicant can get that illusive CUP and not get that PC/N or vice versa. What does Public Convenience mean? The Court of Appeal discussed the phrase in the context of the ABC Rule that long preceded 25958.4. In Sepatis v. ABC Appeals Board (1980), the Court noted:

“It is a matter of common knowledge and experience, known even to judges, that many if not most people patronize bars for reasons which presumably include but also transcend their thirst for intoxicating liquids, and that these reasons have to do with such matters as companionship, aesthetics, and ambience. It is equally a matter of general knowledge that people's tastes

differ widely as to such matters, and that a bar which appeals strongly to one person may be quite unattractive to another.” (Footnote omitted).

The idea character of the premises is to be considered holds to off-sale licensed premises as well. A clean, well-lit safe and secure market may well serve public convenience if the other several liquor stores nearby are dark and frightening to the potential customer.

What happens when you, as licensee, intend to tear down your building and rebuild. Some would call that civic improvement. Your city, however, may call that “time for a new CUP.”

Some municipal codes require a new CUP when there is substantial modification of your premises including rebuilding the site, moving the building, moving the use to another existing building on the property, changing ownership, closing the business for a time period, and selling the business to a third party. ABC licensees should also know that closing licensed premises for a period exceeding 15 consecutive calendar days requires license surrender to the local ABC District Office (See Rule 65).

The courts have reflected on the jurisdiction a city may have to require a CUP where licensed premises have closed for a substantial time and then wish to reopen? In Korean Grocers v. City of Los Angeles (1994), the Court of Appeal held that where liquor stores were burned down during the 1992

civil disturbance, the City of Los Angeles could require a CUP before such store could get an ABC license even where that store was open, licensed and operating without a CUP before its destruction by fire.

In this case, Los Angeles adopted an ordinance requiring a CUP before a destroyed business could be re-licensed in a South LA designated zone. The Korean American Grocers Association sued the City arguing that requiring a CUP as a condition for rebuilding businesses destroyed in the 1992 riot conflicted with the state constitution. The Court of Appeal decided, "...The specific interests and the jurisdictions of each [the City and the ABC] do not conflict."

The Court further held: "We acknowledge the ultimate sanction of permit, or 'deemed approved' status, revocation could have the effect of prohibiting the sale of alcoholic beverages at a particular offending location. However nothing in the [ABC] Act evidences an intent for the ABC to exercise sole and exclusive authority to abate nuisances on premises licensed for off-site sales of alcoholic beverages." (Footnote omitted)

As can be seen, the state legislature has vested overwhelming power in local government as to establishment of new ABC enterprises and re-establishment of old ABC outlets. The Courts have reaffirmed those municipal governments' rights and authority. The CUP systems are in place and will not

be diminished in scope or difficulty.

Don't be surprised when you are at the ABC office to file an application and are given a form and asked, "Do you need a CUP? You need to have your city sign this Zoning Affidavit."

That ZA "Form 255" is your ticket to the marathon roller coaster ride. So when embarking on the adventure of opening a new business, rebuilding, relocating an old business, or significantly expanding an ABC business, be prepared. With careful planning, expert professional assistance, and patience, you can endure and 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 Land Use Permits, Variances, Police and Fire Permits, Entertainment Law, Gaming Law, as well as Personal Injury litigation. Solomon Saltsman & Jamieson can be contacted at 800-405-4222.

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